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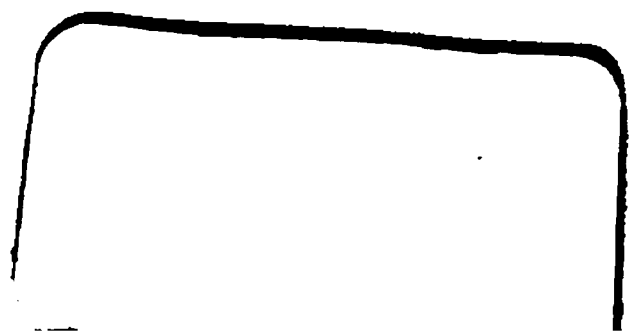
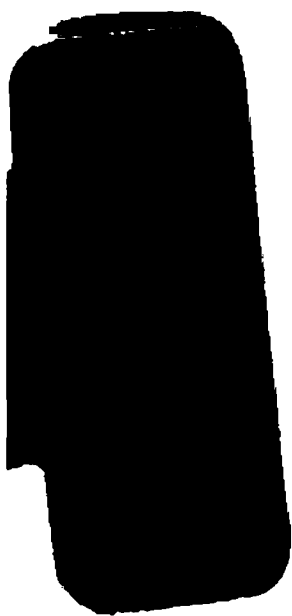
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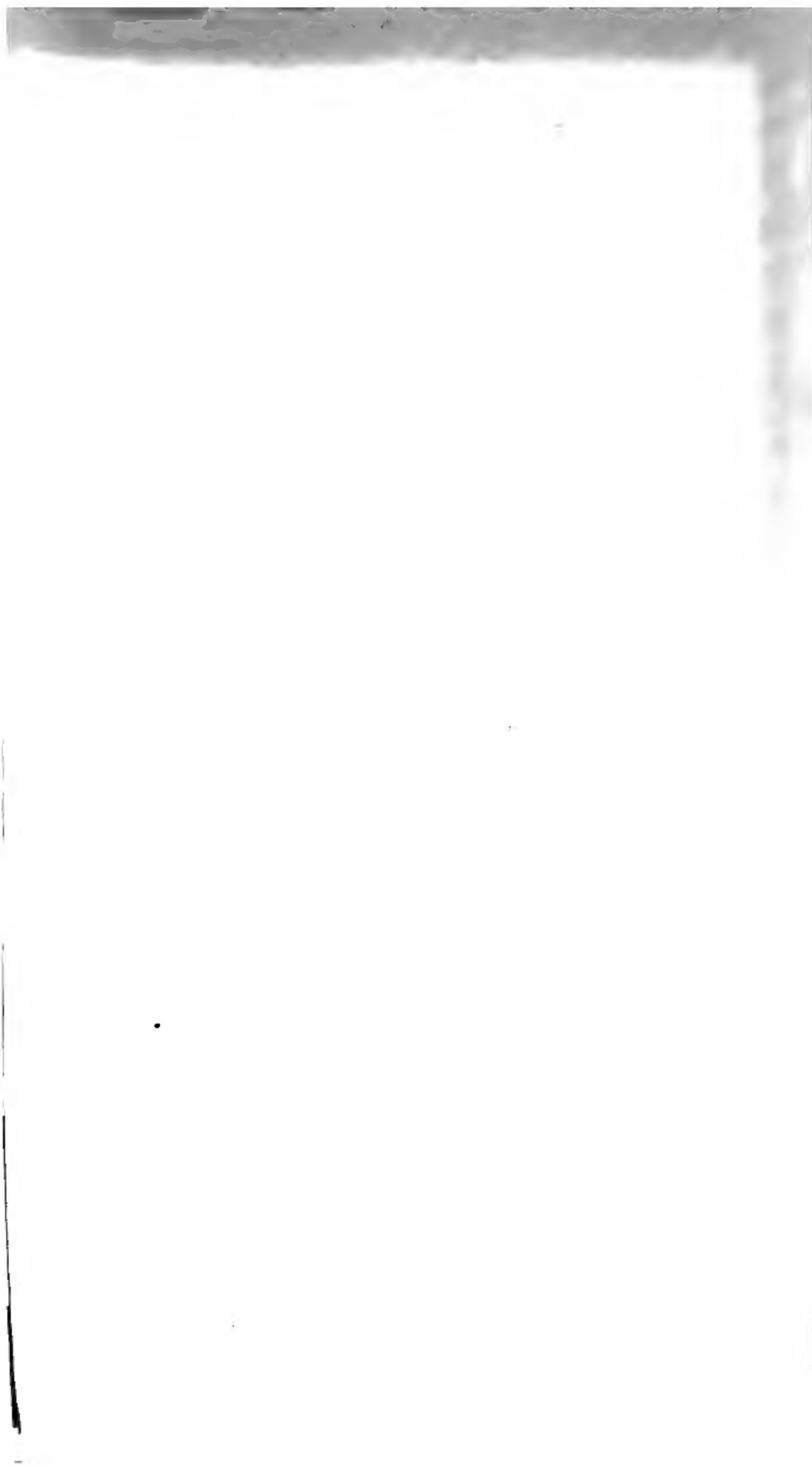
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OF THE

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WITH

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BY

ISAAC GRANT THOMPSON.

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70 ILLINOIS; 71 ILLINOIS; 72 ILLINOIS; 79 ILLINOIS; 80 ILLINOIS
43 IOWA; 15 KANSAS; 16 KANSAS; 17 KANSAS; 66 MAINE;
44 MARYLAND; 34 MICHIGAN; 56 NEW HAMPSHIRE;
66 NEW YORK; 75 NORTH CAROLINA; 76
NORTH CAROLINA; 27 OHIO ST.; 28 OHIO
ST.; 81 PENNSYLVANIA ST.; 82
PENNSYLVANIA ST.; 5 SOUTH
CAROLINA; 40 WISCON-
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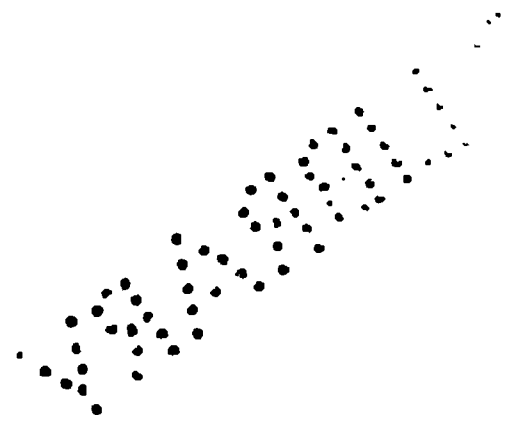
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Alabama (44) 4; (45) 6; (46) 7; (47) 11; (48) 17; (49, 50) 20.

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Bush (Ky.) (7) 8; (8) 8; (9) 15; (10) 19; (11) 21.

California (39) 2; (40) 6; (41, 42) 10; (43, 44, 45, 46) 18; (47, 48) 17;
(49, 50) 19; (51) 21.

Colorado (1) 9.

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Florida (13) 7; (14) 14; (15) 21.

Georgia (40) 2; (41, 42) 5; (43, 44) 9; (45, 46) 12; (47, 48, 49, 50) 15; (51,
52, 53, 54, 55, 56) 21.

Grattan (Va.) (20) 8; (21) 8; (22) 12; (23) 14; (24, 25) 18; (26, 27) 21.

Heiskell (Tenn.) (1) 2; (2) 5; (3) 8; (4, 5) 18; (6, 7) 19.

Houston (Del.) (3) 11; (4) 15.

Illinois (51) 2; (52) 4; (53, 54) 5; (55, 56) 8; (57, 58) 11; (59, 60, 61,
62, 63) 14; (64, 65, 66, 67) 16; (68, 69) 18; (75, 76, 77, 78) 20; * (70,
71, 72, 79, 80) 22.

Indiana (32) 2; (33) 5; (34) 7; (35) 9; (36, 37, 38) 10; (39, 40, 41, 42,
43) 18; (44, 45, 46) 15; (47, 48) 17; (49, 50, 51) 19; (52, 53) 21.

Iowa (27) 1; (28, 29) 4; (30) 6; (31, 32) 7; (33, 34) 11; (35, 36) 14; (37,
38, 39) 18; (40, 41, 42) 20; (43) 22.

Kansas (5, 6) 7; (7, 8, 9) 12; (10, 11, 12) 15; (13, 14) 19; (15, 16, 17) 22.

Louisiana (22) 2; (23) 8; (24, 25) 18; (26, 27) 21.

Maine (57) 2; (58) 4; (59) 8; (60) 11; (61) 14; (62) 16; (63, 64) 18;
(65) 20; (66) 22.

Maryland (31) 1; (32, 33) 8; (34, 35) 6; (36, 37) 11; (38, 39, 40) 17; (41,
42, 43) 20; (44) 22.

Massachusetts (100) 1; (101, 102) 8; (103) 4; (104) 6; (105) 7; (106) 8;
(107) 9; (108) 11; (109) 12; (110) 14; (111, 115) 15; (112, 116) 17;
(118) 18; (114, 117, 118) 19; (119) 20; (120) 21.

* The hiatus in the Illinois Reports arises from the fact that the volumes between the 69th and the 75th were published after the 75th and three succeeding volumes.

- Michigan** (19) 2; (20, 21) 4; (22) 7; (23, 24) 9; (25, 26) 12; (27, 28) 15;
(29, 30, 31) 18; (32, 33) 20; (34) 22.
- Minnesota** (15) 2; (16, 17, 18) 10; (19, 20, 21) 18; (22) 21.
- Mississippi** (42) 2; (43) 5; (44, 45) 7; (46, 47, 48) 12; (49, 50) 19.
- Missouri** (46) 2; (47) 4; (48, 49) 8; (50, 51) 11; (52, 53, 54) 14; (55, 56,
57, 58) 17; (59, 60, 61, 62, 63) 21.
- Nebraska** (3, 4) 19.
- Nevada** (6) 8; (7) 8; (9) 16; (10, 11) 21.
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55) 20; (56) 22.
- New Jersey** (34) 8; (35) 10; (36) 18; (37) 18; (38) 20.
- New York** (41, 42) 1; (43) 8; (44) 4; (45) 6; (46, 47) 7; (48) 8; (49, 50,
51) 10; (52) 11; (53, 54) 18; (55) 14; (56, 57) 15; (58, 59) 17;
(60, 61) 19; (62, 63) 20; (64) 21; (65) 22.
- North Carolina** (65) 6; (66) 8; (67, 68, 69) 12; (70) 16; (71) 17; (72, 73,
74) 21; (75, 76) 22.
- Ohio** (19) 2; (20) 5; (21) 8; (22) 10; (23) 13; (24) 15; (25) 18; (26) 20;
(27, 28) 22.
- Oregon** (3) 8; (4) 18; (5) 20.
- Pennsylvania** (62) 1; (63, 64, 65) 8; (66, 67) 5; (68, 69) 8; (70, 71) 10;
(72, 73) 18; (74, 75) 15; (76, 77) 18; (78, 79, 80) 21; (81, 82) 22.
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- Texas** (32) 5; (33, 34) 7; (35, 36, 37) 14; (38, 39, 40, 41, 42) 19.
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- West Virginia** (4) 6; (5) 18; (6) 20.
- Wisconsin** (24) 1; (25) 8; (26) 7; (27, 28, 29) 9; (30, 31) 11; (32, 33) 14;
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vii

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TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Adams v. Blothen	547	Cokley, Sheeshey v.....	388
Adams v. Mayor of Nashville... 490, note.		Colston, Magruder v.....	47
Alexander, State v.....	675	Commrs. Marshall Co., Lewis v.	375
American Bible Soc., Starkweather v..	183	Commonwealth, Mt. Moriah Cem. Asso.	
Anderson v. Warne..	88	v.....	743
Armour v. Mich Cent. R. R. Co.....	608	Commonwealth, Rolland v.....	753
Arnold, Moses v...	398	Conger v. Atwood.	308
Asbury Life Ins. Co. v. Warren... ..	590	Cooke v. Millard	619
Atwood, Conger v.....	303	Corbley v. Wilson.. .	98
Barber v. St. Louis, Kansas City and		Cowden, Hayner v.....	303
Northn. R. R. Co.....	243	Craft v. McConoughy.....	171
Baltimore and Ohio R. R. Co. v. Wil-		Cragin v. Cragin.....	586
kens.....	26	Crowley, State v.....	719
Beckman, Detroit v.....	507	Darlington v. United States	706
Behrens, Lucht v.....	378	Deming, Wilkinson v.....	192
Bell v. Campbell.....	384, note.	Dennis v. Ryan.....	685
Bird v. Munroe	571	Detroit v. Beckman.....	507
Bixby v. Dunlap.....	475	Detroit v. Martin.....	512
Blanchard v. Lambert.....	245	Dewey v. Warriner.....	91
Blothen, Adams v.	547	Doyle, State ex rel. Drake v.....	608
Boggs v. Willard.....	77	Drake, State ex rel., v. Doyle.....	608
Bomberger, Kreiter v.....	750	Dudley v. Odom.....	6
Boyd, Third Nat. Bank of Baltimore v.	85	Dumont, Petrel v.....	397
Braun, Wittans v.....	44	Dunlap, Bixby v.....	475
Brethance, Happel v.....	70	Elkins, Ward's Cent. & Pac. Lake Co..	544
Brewster, Burlingame v.....	177	Evans, Morgan v.....	154
Briggs, Powers v.	175	Fennell, Goodale v..	331
Briggs, Williams v.....	653, note.	Ferrell v. Maxwell.....	308
Bromley v. Goodrich.....	685	First Nat. Bank of Quincy v. Ricker..	104
Brown, People v..	531	First Nat. Bank v. Petersborough	416
Burlingame v. Brewster.....	177	Fleming, King v.....	131
Campbell, Bell v.....	384, note.	Fleming, State v.....	553
Central Nat. Bank v. Charlotte, Colum-		Fletcher, Highborn v.....	363
bia and Augusta R. R. Co.....	13	Foots, Pennywit v.	340
Chandler v. Coe	437	Fosdick v. Greene.....	338
Charleston, Jenkins v.	14	Foster, McPherson v	315
Charleston v. People's Nat. Bank.....	1	Fox v. Reeder	370
Charlotte, Augusta & Columbia R. R.		Fuller v. Steiglitz.....	313
Co., Central Nat. Bank v.....	13	Girard F. & M. Ins. Co., McCluer v.....	349
Chariton v. Miller....	307	Godfrey, Ill. Cent. R. R. Co. v.....	113
Chicago, Burlington & Quincy R. R.		Goodale v. Fennell	337
Co., Stodghill v.....	211	Goodrich, Bromley v.....	685
Childs, Harvey v.....	387	Goss v. Coffin	585
Citizens' Ins. Co., West v.....	204	Greene, Fosdick v..	338
City of Lansing v. Toolan.....	510, note.	Guardian Mut. Life Ins. Co. v. Hogan..	180
City Savings Bank, Simpson v	491	Hackett, Helsrodt v... ..	529
Clark, Hibbard v.....	433	Hadden v. Knickerbocker.....	30
Clendinen, Maryland Mut. Ben. Soc. v.	53	Hall, Shannon v.....	146
Coe, Chandler v.....	437		
Coffin, Goss v.....	535		

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Happel v. Brethauer.....	70	Magruder v. Colston.....	47
Hardesty v. Richardson.....	57	Manchester, Warde v.....	504
Hardy v. Merrill.....	441	Martin, Detroit v.....	512
Harriman, Stewart v.....	408	Maryland Mut. Ben. Soc. v. Clendinen.	52
Hart v. Stickney.....	728	Mathers, St. Louis, Jacksonville & Chi-	
Harvey v. Childs.....	287	cago R. R. Co v.....	122
Hayes v. Livingston.....	533	Maxwell, Ferrell v.....	203
Hayner v. Cowden.....	303	McCaffrey v. Woodin.....	644
Haynes, State v.....	560	McCluer v. Girard F. & M. Ins. Co.....	249
Heisrodt v. Hackett.....	520	McConoughy, Craft v.....	171
Henderson v. Palmer.....	117	McLaughlin, State v.....	264
Hey v. Philadelphia.....	733	McPherson v. Foster.....	215
Hibbard v. Clark.....	432	Meador v. White.....	551
Hichborn v. Fletcher.....	562	Melvin v. Lamar Ins. Co.....	199
Hill, Lindsay v.....	564	Melvin v. Lisenby.....	141
Hogan, Guardian Mut. Life Ins. Co. v..	180	Merrill, Hardy v.....	441
Holbrook v. Tobey.....	581	Merritt v. Yates.....	128
Holder v. Lafayette, Bloomington &		Mich. Cent. R. R. Co., Armour v....	603
Miss. R. Co.....	89	Millard, Cooke v.....	619
Hollida v. Hunt.....	63	Miller, Charlton v.....	307
Horst v. Wagner.....	255	Miller, People ex rel. Northwestern	
Hoyt v. Hudson.....	714	University v.....	187
Hudson, Hoyt v.....	714	Miller's Estate.....	754
Hunt, Hallida v.....	63	Milwaukee Indus. School v. Super-	
Hussey v. Sibley.....	557	visors of Milwaukee Co.....	702
Illinois Cent. R. R. Co. v. Godfrey.....	112	Mitchell, Pritchett v.....	287
Insurance Co. v. O'Maley.....	769	Morgan v. Evans.....	154
Isett v. Stuart.....	194	Moses v. Arnold.....	239
Jenkins v. Charleston.....	14	Mount Moriah Cem. Asso. v. Com-	
Johnson, Richardson v.....	712	monwealth.....	743
Johnson, Sebastian v.....	144	Murtland, White v.....	100
Johnson, State v.....	663	Munroe, Bird v.....	571
Joint School Dist., Spencer v.....	263	Nashville, Adams v.....	430, note.
Kane, Reserve Mut. Ins. Co. v.....	741	Nichols, Macomber v.....	522
Kennedy, State v.....	683	North Carolina R. R. Co., University v.	671
Kingsbury, Yandle v.....	282	Northwestern University v. People	
King v. Fleming.....	131	ex rel. Miller.....	187
Knickerbocker, Hadden v.....	80	Oceana Co. Bk., Union Natl. Bank v.	135
Knight, Smith v.....	94	Odom, Dudley v.....	6
Kreiter v. Bomberger.....	750	O'Maley, Insurance Co. v.....	769
Lafayette, Bloomington & Miss. R. Co.,		Palmer, Henderson v.....	117
Holder v.....	89	Parker, State v.....	609
Lake View v. Cemetery Co.....	71	Pennywit v. Foote.....	340
Lamb, Shattuck v.....	656	People ex rel. Miller, Northwestern	
Lambert, Blanchard v.....	245	University v.....	187
Lamar Ins. Co., Melvin v.....	199	People's Nat. Bank, Charleston v.....	1
Lansing v. Toolan.....	510, note.	People, Storey v.....	153
Lembca, Warnecke v.....	85	People v. Brown.....	531
Lewis v. Commissioners of Marshall		Peterborough, First Nat. Bank v.....	416
Co.....	275	Petrel v. Dumont.....	397
Lindsay v. Hill.....	564	Phelps v. Phelps.....	149
Lisenby, Melvin v.....	141	Philadelphia, Hey v.....	733
Livingston, Hayes v.....	533	Philadelphia, Smith v.....	731
Logan v. Pyne.....	261	Philadelphia v. Scott.....	738
Lucht v. Behrens.....	378	Pittsburgh, Seeley v.....	760
Macomber v. Nichols.....	522	Portsmouth, Rowe v.....	464
		Powers v. Briggs.....	175
		Pritchett v. Mitchell.....	287

TABLE OF CASES REPORTED

xi

	PAGE		PAGE
Pyne, Logan v.....	261	St. Louis, Kansas City & Northern R.R. Co., Barber v.....	248
Reeder, Fox v.....	370	Stodghill v. Chicago, Burlington & Quincy R. R. Co.	211
Reserve Mut. Ins. Co. v. Kane..	741	Storey v. People.....	158
Richardson, Hardesty v.....	57	Stuart, Isett v.	194
Richardson v. Johnson.....	712	Supervisors of Milwaukee Co., Milwau- kee Industrial School v.	708
Ricker, First Nat. Bank of Quincy v...	104		
Rider v. White.....	600	Third National Bank of Baltimore v. Boyd ...	85
Robinson v. Wilson.....	272	Tiffany v. St. John.....	612
Rolland v. Commonwealth.....	758	Tobey, Holbrook v	581
Rose Hill Cem. Co., Town of Lake View v.....	71	Town of Lake View v. Rose Hill Cem. Co.	71
Ross, State v.....	678	Tuller, In re.....	164
Rowe v. Portsmouth	464		
Ryan, Dennis v.....	685	Union Nat'l Bank v. Oceana Co. Bank.	185
Scott, Philadelphia v.....	788	United States, Darlington v.	766
Sebastian v. Johnson.....	144	University v. North Carolina R. R. Co.	671
Seeley v. Pittsburgh.....	760		
Shannon v. Hall.....	146	Wagner, Horst v.	255
Shattuck v. Lamb	666	Warne, Anderson v	83
Sheehy v. Cokley	236	Warnecke v. Lemboa.....	85
Sibert v. Wilder.....	280	Warde v. Manchester....	504
Sibley, Hussey v.	557	Ward's Central & Pacific Lake Co. v. Elkins	544
Simpson v. City Savings Bank.....	491	Warren, Asbury Life Ins. Co. v.	500
Smith v. Knight... ..	94	Warriner, Dewey v	91
Smith v. Philadelphia.....	781	West v. Citizens' Ins. Co.....	294
Spencer v. Joint School District.....	268	White, Meader v.....	551
Starkweather v. Am. Bible Society.....	183	White v. Murtland.....	100
State ex rel. Drake v. Doyle.....	692	White, Rider v.....	600
State v. Alexander.....	675	Wilder, Sibert v.....	280
State v. Crowley	719	Wilkena, Baltimore & Ohio R.R. Co. v.	26
State v. Flemming.....	552	Wilkinson v. Deming.....	192
State v. Haynes.....	569	Willard, Boggs v.	77
State v. Johnson.....	666	Williams v. Briggs.....	658, note.
State v. Kennedy.....	683	Wilson, Corbley v.	93
State v. McLaughlin	264	Wilson, Robinson v.....	272
State v. Parker	609	Wing v. Wing.....	543
State v. Ross.....	678	Winthrop, State v.....	267
State v. Winthrop	267	Witthaus v. Braun.....	44
Steamer Petrel v. Dumont.....	297	Woodin, McCaffrey v.....	644
Steiglitz, Fuller v.	312		
Stewart v. Harriman.....	408	Yandle v. Kingsbury.....	282
Stickney, Hart v.	728	Yates, Merritt v.....	126
St. John, Tiffany v.	612		
St. Louis, Jacksonville & Chicago R. R. Co. v. Mathers.....	123		

TABLE OF CASES CITED.

	PAGE.		PAGE.
Abbott v. Goodwin, 20 Me., 400, 406....	406	Asheom v. Smith, 3 Penn. 229.....	120
Abernethy v. Tatimore, 19 Ohio, 205....	205	Ashland v. Marlborough, 60 Mass., 47....	406
Abrams v. Smith, 8 Blackf., 93.....	100	Aspinwall v. Knox Co., 31 How., 595....	595
Achtenbagen v. Watertown, 18 Wis. 301	715	Aspinwall v. The County of Davison, ..	225, 226
Acraman v. Morrice, 8 U. D. 445	428	22 Howard, 205	225, 226
Adams v. Carlisle, 21 Pick. 147	715	Atkinson v. Bell, 8 R. & C. 277	406
Adams v. Funk, 53 Ill. 219	97	Atkyns v. Kinsler, 4 Rich. 779	406
Adams v. Gay, 19 Vt. 358	122	Atwell v. Zeluff, 26 Mich. 112, 120.....	512
Adams v. Patrick, 30 Vt. 516	560	Attorney-General v. McDonald, 8 Wis.	790
Adams v. Penn. Ins. Co. 1 Rawle, 106....	742	805	790
Adams v. Robertson, 37 Ill. 45	209	Attorney-General v. Minor, 3 Laws. 202, 207	207
Adams v. Rodarmel, 19 Ind. 329	317	Auditor v. Treasurer, 4 S. C. 311	78
Adderly v. Storm, 6 Hill, 624	50	Aurora Branch R. R. Co. v. Grimes, 13	115, 116
Actna Nat'l Bank v. Fourth Nat'l Bank,	100	Ill. 583	115, 116
46 N. Y. 82	100	Austin v. Chittenden, 23 Vt. 540	209
Agricultural Nat'l Bank v. Sheffield, 4	200	Austin v. Munro, 47 N. Y. 300	279
Bun. 421	200	Aveson v. Lord Kinnaird, 6 East, 129..	596
Akerly v. Villas, 34 Wis. 165	80	Ayre v. Craven, 2 A. & E. 2	325
Akerly v. Villas, 1 Abb. U. S. Rep. 204 ..	80	Ayer v. Norwich, 12 Am. Rep. 209....	209
Ala. & Chat. R. R. Co. v. Jones, 5 R. R.	97	Ayer v. Norwich, 30 Conn. 376	225
Albany v. Case, 1 Rep. 110	55	Babcock v. Granville, 44 Vt. 228	590
Alcorn v. Hooker, 7 Blackf. 55	200	Babcock v. Utter, 1 Keyes, 115....	644
Aldrich v. Campbell, 4 Gray, 264	213	Bach v. Meata, 5 Maule and Selw. 200....	60
Aldrich v. Cheshire R. R. Co. 1 Foster,	233	Bacon v. Charlton, 7 Cush. 581.....	596
N. H. 259	213	Badger v. Jones, 66 N. C. 205	379
Aldridge v. Johnson, 7 E. & B. 308....	605	Bailey v. Smith, 12 Me. 196	540
Alfele v. Wright, 17 Ohio St. 226	303	Bailey v. Snyder, 13 S. & R. 100	710
Allen v. Burlington, 45 Vt. 308	200	Bailey v. The Mayor of New York, 8	407
Allen v. Fox, 51 N. Y. 502, N. C. Am. Rep.	201, 206	Hill 531	407
641.	201, 206	Bailey v. Wakeman, 2 Denio, 230.....	94
Allen v. Hillman, 12 Pick. 101	540	Baird v. Cochran, 4 S. & R. 307.....	94
Allen v. Massey, 17 Wall. 361	604	Baker v. Cincinnati, 11 Ohio St. 204....	612
Allerton v. Helden, 49 N. Y. 378	281	Baker v. Gray, 17 C. B. 462	647
Alley v. Inhabitants of Edgecomb, 22	222	Baker v. Portland, 68 Mo. 199	590
Me. 446	222	Baker v. State, 23 Miss. 244	590
Allison v. Allison, 4 Hawke, 141	414	Baker v. Townshend, 1 J. B. Moore, 120.	220
Allen v. R. R. Co. 105 Mass. 77	715	Balch v. Patten, 45 Me. 41	261
Alprin v. Morton, 21 Ohio St. 536	306	Baldwin v. Greenwood's Turnpike Co.,	730
Alvis et al. v. Morrison, 62 Ill. 181; 8 C.	148	18 Am. Rep. 21, 8 C. 40 Conn. 220..	730
14 Am. Rep. 117	148	Baltimore Fire Insurance Co. v. Mo-	206
Amesbury Woolen & Cotton Mfg. Co. v.	461	Gowan, 16 Md. 47	206
Inhabitants of Amesbury, 17 Mass.	616	Bancroft v. Abbott 3 Allen, 504	504
461	616	Bank v. Baugh, 9 Sm. & M. 290	145
Anderson v. Anderson, 9 Ohio, 108....	244	Bank of U. S. v. Bank of Georgia, 10	106
Anderson v. The Bank, Johnson's C. C.	305	Wheat 338	106
Anderson v. Buchanan, Wright, 136....	606	Bank v. Dunn, 6 Pet. 51	94
Andover v. Grafton, 7 N. H. 202	216	Bank of Augusta v. Earle, 13 Pet. 619...	619
Andover & Medf'd Turnpike	179	Bank of Mo. v. Hull, 7 Mo. 273	96
Andrews v. Estes 11 Me. 207	645	Bank v. Jones, 8 Pet. 12	96
Andrews v. Newcomb 22 N. Y. 417	606	Bank v. Lamb, 50 N. Y. 46	430
Andrews v. Pond, 13 Pet. 65	606	Bank of Pennsylvania v. McCalmont, 4	700
Annapolis & Elkridge R. R. Co. v. Balti-	251	Rawle 307	700
more Fire Ins. Co., 22 Md. 37; 8 C., 8	251	Bank of Tenn. v. Woodson, 7 Coldw.	245
Am. Rep. 112	251	178	245
Apperson v. Moore, 21 Am. Rep. 170 ..	440	Bank of U. S. v. Bank of Washington, 6	519
Arbuckle v. Tracy, 16 N. Y. 255....	300	Pet. 8	519
Arbuckle v. Tracy, 16 Ohio, 422	300	Bank of Utica v. Hillard, 5 Cow. 118....	96
Argus v. Wason, 21 Am. Rep. 718	440	Banks v. Gibson, 34 Beav. 502....	45
Armstrong v. Plerson & Clarke, 29	304	Banks v. McClellan, 24 Md. 60	200
Arndt v. Arndt, 15 Ohio, 23	344	Banks v. Werts, 13 Ind. 303	120
Arnold v. Cambridge, 106 Mass. 222 ..	515	Banks v. Whitehead, 7 Ala. 89	407
Ashby v. Ashby's Ex'rs, 1 Barn. & Cres.	444	Barber et ux v. Merriam, 11 Allen, 220	506
444	200	Barham v. Turberville, 1 Swan. 407.....	507
		Barlow v. Stalworth, 27 Ga. 617	245
		Barker v. Cotmins, 110 Mass. 447.....	445

	PAGE		PAGE
Barker v. M. F. Ins Co., 3 Wend. 94	179	Blake v. Layton, 6 T. R. 291	407
Barnard v. Eaton, 2 Cusb. 294	454	Blakely v. Abert, 1 Dana, 185	345
Barnes v. McKay, 7 Ind. 301	526	Blanchard v. Blanchard, 48 Me. 174	497
Barnes v. Union Mutual Fire Insurance Company, 57 Me. 110	265	Blanchard v. Paige, 8 Gray 201	498
Barnett v. Manapomery, 6 Mon. 328	457	Biven v. H. R. R. Co., 36 N. Y. 408	515
Bartholomew v. Yaw, 9 Paige, 185	292	Blodgett v. Morrid, 20 Vt. 500	296
Bartlett v. Delprat, 4 Mass. 702	594	Blood v. Goodrich, 9 Wend. 68	548
Bartlett v. Hooksett, 45 N. H. 18	522	Blood v. Howard Fire Ins. Co., 12 Cusb. 472	264
Bartlett v. Knight, 1 Mass. 401	245	Blossom v. Railroad, 3 Wall 205	146
Barrall v. Trussell, 4 Taunt. 117	255	Blunt v. Little, 3 Mass. 102	496
Barratt v. Allen, 10 Ohio, 455	321	Blundenburgh v. Cotheat, 1 Duer, 178	497
Barrow v. Congregational Society in Lee & Allen, 490	179	Bear v. McCormick, 1 S. & R. 165	720
Barry v. Ransom, 2 Kern 498	295	Boardman v. Paige, 11 N. H. 441	498
Barton v. Morris, 15 Ohio, 408	125	Boardman v. Bill, 1 Camp 410	416
Bartsch v. Atwater, 1 Conn. 409	580	Boardman v. Woodman, 47 N. H. 150	444
Bascorn v. Albertson, 34 N. Y. 610	140	Boardman v. Woodman, 47 N. H. 148	446
Bassett v. Spofford, 45 N. Y. 287	406	Bohlett v. Drescher, 10 Kan. 9	299
Bates v. Stanton, 1 Duer, 79	405	Bodkins v. Taylor, 14 Ohio, 429	94
Bates v. Todd, 1 M. & R. 108	403	Bog Lead Co. v. Montague, 10 C. R. 47	401
Bates v. Wilcox, 1 Handy, 532	522	Bog Lead Co. v. Montague, 10 C. R. 47	401
Baxter v. Abbott, 7 Gray 71	446	Boggs v. Willard, 3 Hiss 256	79
Baxter v. Duer, 2 Me. 434	568	Bolander v. Gentry, 36 Cal. 105	499
Beatty v. Gingles, 8 Jones Law, 302	479	Bolton v. Arme, Cases in Chan. 55	548
Beaumont v. Co. de la 12 M. h. 459	459	Boone v. Hall, 7 Bush, 65; S. C., 3 Am. Rep. 284	105
Beauchamp v. Parry, 1 H. & Ad. 80	94	Booth v. Sweeney, 8 N. Y. 278	94
Beckwith v. Union Bank, 9 N. Y. 213	317	Booth v. Town of Woodbury, 32 Conn. 118	292
Bedloe v. Wadsworth, 21 Wend. 125	657	Bond v. Fitzpatrick, 4 Gray, 69	94
Becker v. Ackerman, 1 Robt. Jr. S. O. 146; Pr. L. S. 143	290	Borden v. Fitch, 15 Johns. 121	361
Beckman v. Benson, 20 N. Y. 308	140	Boston Glass Manufactory v. Binney, 4 Pick. 425	407
Beesley v. Wingfield, 11 East, 45	122	Boston & Sandwich Glass Co. v. Boston, 4 Metc. 161	510
Belding v. G. & W. 26 Ark. 498	344	Bothwell v. Browne, 51 Ill. 234	119
Bell v. Campbell, 17 Kan. 211	294	Bottle v. Crenshaw, Johnson's C. C. 294	545
Bellamy v. Sabine, 3 Jur. (N. S.) 948	376	Botts & Darnall v. Crenshaw, Chase, 224	296
Bell v. Page, 21 Ark. 283	344	Boughton v. Smith, 28 Barb. 626	201
Bell v. Wood, 1 Hay 249	122	Bowen v. Buck, 2 Wallama, 248	121
Bennett v. Black, 4 V. & A. 494	649	Boy v. Lonsdale Fire Ins. Co., 16 N. Y. 240	295
Bennett v. Black, 2 Ala. 495	344	Boy v. Russell, 2 C. W. 444	707
Bennett v. Morley, 10 Ohio, 100	371	Boyd v. Boyd, 60 Fern. St. 293	449
Bennett v. Williams, 5 Ohio, 462	410	Boyd v. Moore, 5 Mass. 305	418
Bent v. Baker, 1 Fern. 27	410	Boylan v. Streamer Victory, 40 Minn. 244	296
Bent v. Pratt, 2 Wend. 385	490	Boytton v. Clinton and Essex Mut. Ins. Co., 10 Barb. 294	299
Berdan v. Seligwick, 40 Barb. 359	291	Bradford v. Sykes, 2 Ala. 134	392
Bergery v. Duff, 4 Johns. Ch. 84	145	Bradlee v. Boston Glass Co., 16 Pick. 350	178
Berkley v. Wathing, 7 Ad. & El. 20	406	Bradley v. Saline Falls Manuf. Co., 3 N. H. 487	449
Berthel v. Goodenough, 24 How. 526	394	Bradley v. Benson, 6 Ind. 425	497
Besant v. Southard, 6 Sed. 28	637	Bradley v. Mayor of New York, 20 N. Y. 417	219
Besant v. Wathen, 6 L. J. 18	126	Brand v. Focht, 1 Keyes, 409	499
Bellison v. Bromley, 12 East 210	409	Brayne v. Cooper, 5 M. & W. 249	295
Berlin v. Conn. Mutual Life Ins. Co., 23 Conn. 361	747	Brayne v. Cooper, 5 M. & W. 249	295
Bibb v. Hitchcock, 49 Ala. 499; 30 Am. Rep. 298	121	Brewster v. Hough, 10 N. H. 143	19
Bickford v. First National Bank, 49 Ill. 308	195	Brighton v. Claffin, 31 Wis. 607; N. C., 11 Am. Rep. 623	126
Bigelow v. Folger, 2 Metc. 365	313	Brolaskey v. McClain, 11 P. F. Smith, 161	721
Bigelow v. Foss, 66 Me. 188	530	Brown v. Kingle, 1 Howe, 311	494
Bigelow v. Pritchard, 21 Pick. 169	494	Brown v. Newberry, 2 Doug. 88	494
Bigelow v. Randolph, 14 Gray, 541	468	Brook v. Brook, 9 H. L. Cas. 193	498
Billings v. Tolland Ins. Co., 20 Conn. 139	255	Brooke v. Filer, 3 Ind. 402	298
Billington v. Wagoner, 25 N. Y. 51	292	Brooker v. Coffin, 1 Am. Lead Cases, 78	543
Bill v. Bement, 9 M. & W. 26	581	Brookman v. Hamill, 43 N. Y. 554	491
Bill v. Voss, 27 N. H. 213	444	Brooks v. Avery, 4 Com. 225	295
Bishop v. Crawshaw, 3 B. & C. 415	629	Brooks v. Avery, 4 N. Y. 225	291
Bishop v. Small, 48 Me. 13	538	Browning v. Stallard, 5 Taunt. 450	296
Bitwell v. Briggs, 8 Mass. 468	348	Brown v. Hewet, 30 N. Y. 519	497
Bitwell v. Kellogg, 60 Barb. 617	281	Brown v. Hare, 3 H. & N. 494	499
Bixby v. Brundage, 9 Gray, 129	444	Brown v. Leckie et al., 43 Ill. 497	196
Black v. Ward, 15 Am. Rep. 171	521	Brown v. Maryland, 12 Wheat. 419	95
Blackwell v. Willard, 45 N. C. 545	361	Brown v. Nickerson, 5 Gray, 1	295
Blackwood v. Jones, 4 Jones' Eq. 84	537	Brown v. Padgett, 25 Ga. 408	121
Blair v. Commonwealth, 25 Gratt. 398	677		
Blake v. Cole, 25 Pick. 97	305		
Blake v. Fuch, 44 Ill. 308	534		
Blake v. Insurance Co., 13 Gray, 225	253		
Blake v. Lanyon, C. D. & R. 228	479		
Blake v. Lanyon, 6 T. R. 228	486		

TABLE OF CASES CITED.

IV

PAGE		PAGE		
Brown v. The Powell Duffryn Steam Coal Co., L. R., 10 C P 502	31	Carmichael v. State, 15 Ohio St. 554	632	
Brown v. Warren, 42 N. H. 420	433	Carow v. Kelley, 8 C. & B., Barb. 200	301	
Brown v. Wheeler, 15 Conn. 245	520, 527	Carpenter v. Farnsworth, 106 Mass. 501;	179	
Brown v. Wright, 21 La. 96	344	8 Am Rep 360	179	
Brownell v. Hawkins 4 Barb. 401	545	Carpenter v. Mooers, 26 Ill. 102	120	
Bruce v. Schuyler, 4 Ohio 221	170	Carpenter v. Pennsylvania, 17 How. 400	507	
Bush v. Wilkins 4 Johns. 508	168	Carr v. Allatt, 5 L. J. Ex	547	
Bryan v. Smith, 22 Ala. 584	555	Carr v. Allatt 3 H. & N. 954	575	
Bryan v. Whistler 8 B. & C. 288	544	Carr v. Nat. Security Bank, 107 Mass.	150	
Bryne v. Weeks, 7 How. 300	505	45 Am Rep 4	150	
Buchanan v. Currey, 19 Johns. 137	345	Carr v. Northern Liberties, 35 Penn. St.	500	
Buch v. Appleton 14 Me. 274	94	324		
Buck v. First National Bank, 27 Mich.	121	Carratt v. Morley, 1 Gale & Davidson,	541	
308, 15 Am Rep 109	550	275		
Buck v. Hersey, 31 Me. 558	533	Carrington v. Taylor, 11 East, 571.	420	
Buck v. Waddle, 1 Ohio, 367	205	Carroll v. Carroll, 20 Tex. 731	246	
Buckley v. Garrett, 47 Penn. St. 280.	306	Carroll v. East St. Louis, 67 Ill. 508	127	
Buckley v. Knapp, 48 Mo. 153	308	Carter v. Dubuque, 35 Iowa, 416	210	
Buckley v. Lytle, 10 Johns. 117	345	Carville v. Crane, 5 Hill, 443	304	
Buckley v. Stewart, 1 Day (Conn.) 123	515	Cass v. Henderson, 23 La. Ann. 49, 8	100	
Buckmyer v. Darnell, 2 Ld. Raym. 1085	518	Am. Rep. 500	100	
Bucknall v. Story, 46 Cal. 589	578	Cassell v. Backrack, 42 Mass. 56	340	
Bucknam v. Nash, 15 Me. 474	508	Castling v. Aubert, 2 East	305	
Bulger v. Roche, 11 Pick. 20	293	Castle v. Swarder, 6 H. & N. 832	620	
Bullock v. Boyd Hoff Ch. 394	291	Catlin v. Henton, 9 W. & A. 476	120	
Bullard v. Haynor, 30 N. Y. 197	273, 275	Caughey v. Smith, 4 N. Y. 244	427	
Bullen v. Hiatt, 13 Kan. 94	280	Caulkins v. Hellman, 4 N. Y. 449	504	
Bullen v. Sharp, 1 Law Reporter, 112	494	Cavan v. Kelley, 3 Ash. 1, Jour. 373	301	
Bumgardner v. Circuit Court, 4 Mo. 50	501	Cavender v. Steamer Fanny Barker, 40	300	
Bunnell v. The Collinsville Savings Soc., 28 Conn. 303	230	Miss. 235	371	
Burford v. Wible, 22 Penn. St. 45	558	Center v. The P. & M. Bank, 22 Ala. 743	305	
Burgees v. Chapman, 5 H. L. 225	306	Chadwick v. Briggs, 13 Mass. 248	170	
Burk v. Osborn, 9 B. Monr. 679	535	Chadsey v. McGreevy, 27 Ill. 253	200	
Burkhalter v. Edwards, 16 Ga. 508	578	Chalmers v. Shackell, 6 C. & P. 475	200	
Burnham v. Howard, 31 Me. 549	414	Chamberlain v. City of Burlington, 19	284	
Burns v. Erben, 1 Rob. 559	578	Iowa 44	500	
Burns v. Taylor, 23 Ala. 255	578	Chamberlain v. Perkins, 51 N. H. 340	716	
Burrill v. Silberman, 16 Barb. 198	414	Chamberlain v. R. R. Co., 7 W. & A. 425	379	
Burt v. Burt, 2 Swaby & Tristram, 36...	532	Chambers v. Robbins, 28 Conn. 545	407, 410	
Burt v. Merchants Insurance Co., 108	709	Chambers v. Robinson, 1 Stra. 691	306	
Mass. 358, 8 C. & B. 5 Am Rep 339	505	Chandler v. Brown, 77 Ill. 341	94	
Burton v. Wilkinson 18 Vt. 186	505	Chandler v. Morton, 5 Greenl. 374	146	
Burwell v. Mandeville, 2 How. (N. S.)	384	Chandler v. Rider, 102 Mass. 270	531	
340	45	Chandler v. Sanger, 13 Am. Rep. 367	531	
Bury v. Bedford, 31 Law Jour. ch. 445	379	Chaplin v. Cram 40 Mo. 61	535, 536	
Bush v. Canfield, 5 Conn. 485	579	Chapman v. Rich, 61 Me. 588	580	
Bush v. Holmes, 53 Me. 117	611	Chapman v. Welmer, 4 Ohio, 491	517, 555	
Bush v. Lathrop, 22 N. Y. 535	645	Charles River Bridge v. Warren Bridge,	300	
Butt v. Elliott, 19 Wall. 544	385	11 Pet. 420		
Butler v. Mehlring, 15 Ill. 488	487	Charnow v. Charnow, 1 N. Y. Leg.	210	
Butterfield v. Ashley, 6 Cush. 249	488	Obs. 14	210	
Butterfield v. Ashley, 2 Gray, 254	91	Charter v. Beckett, 7 L. R. 301	500	
Butts v. Wood, 37 N. Y. 317	385	Chase v. Allen 13 Gray, 42	500	
	385	Chase v. Washburn 1 Ohio, St. 244	500	
Cable v. Alvord, 27 Ohio St. 654	500	Chatfield v. Wilson 8 Vt. 49	400	
Cable v. Dakin, 20 Wend. 172	500	Chetney v. The Lafayette Bloomington	90	
Cabot Bank v. Morton 4 Gray, 156	500	and Mississippi Railway Co., 86 Ill.	570, 8 C. & B. 18 Am. Rep. 544	500
Cadwell v. Kirkpatrick, 6 Ala. 60	534	Chesley v. Joselyn 7 Gray, 409	500	
Caery v. Willocks 6 N. H. 177	534	Chicago & Alton R. R. Co. v. Gretzner,	116	
Cain v. Gimon, 26 Ala. 169	534	46 Ill. 74		
Calcutta Company v. De Mattos, 23 L.	534	Chicago Marine and Fire Insurance Co.	100	
J. 214	534	v. Stanford, 28 Ill. 188	100	
Caldwell v. Carrington's Heirs, 9 Pet. 86	534	Chicago v. Rumpf 45 Ill. 90	170	
Callendar v. Marsh, 1 Pick. 418	510	Chick v. Trerett, 20 Me. 402	170	
Cameron v. McFarland, 2 Car. Law Re-	122	Chick v. Willetts, 2 Kan. 384	70	
pos. 415	122	Child v. Boston 4 Allen, 41	400, 500	
Cammack v. Lewis, 15 Wall. 643	185	Child v. Gasworthy, 6 C. & B. 471	547, 548	
Campbell v. Cooper, 34 N. H. 49	400	Child v. Boston 4 Allen, 41	400, 500	
Campbell v. Johnston, 4 Dana, Ky. 177	290	Christy v. Flemington 10 Penn. St. 130	200	
Campbell v. Morsey Dock Co. 14 C. B.	412	Christy v. Russell 15 W. & A. 250	301	
Campbell v. Morrison, 7 Paige, 150	292	Church v. Burdett 21	300	
Canal Co. v. Railroad Co., 4 Gill and	135	Church v. Suter, 4 Mass. 156	94	
Johns. 1	345	Clyoweth v. Tenney 15 W. & A. 397	547, 555	
Cappell v. Hall, 7 Wall. 545	487	Cochran v. Peery, 23 Ohio St. 60	510	
Carow v. Rutherford, 106 Mass. 1	501	City of Burlington v. Keller, 18 Iowa,	207	
Card v. Case, 55 C. B. 622	501	no		
Carmichael v. Bodfish, 28 Iowa, 418	380	City of Lansing v. Toolan, 16 Alb. Law	510	
		Jour. 164		
		City of Lexington v. Butler, 14 Wall. 222	200	

	PAGE.		PAGE.
Clapp v. County of Cedar, 5 Iowa, 15..	218	Commonwealth Ins. Co. v. Berger, 6	
Clapp v. Hanson, 15 Me. 845.....	94	Wright, 285.....	772
Clapp v. Rice, 15 Gray, 657.....	563	Commonwealth v. Johnson, 8 Cush.	
Clark v. Buchanan, 2 Minn. 846.....	278	454.....	123
Clark v. City of Des Moines, 19 Iowa,		Commonwealth v. Kendig, 2 Penn. St.	
199.....	222, 224	448.....	183
Clark v. Clark, 10 N. H. 860.....	498	Commonwealth v. Lockwood, 109 Mass.	
Clark v. Conroe, 88 Vt. 475.....	657	323.....	677
Clark v. Diggs, 6 Fred. 159.....	535	Commonwealth v. Morrill, 8 Cush. 571.	727
Clark v. Firemen's Insurance Co., 18		Commonwealth v. Pease, 16 Mass. 91;	
La. (O. S.) 431.....	254	1 Camp. 45; 2 M. & S. 201.....	119, 123
Clarke v. Harper, 6 Vin. 427.....	681	Commonwealth v. Pomeroy, 117 Mass.	
Clark v. Hougham, 2 Barn. & Cress. 149	281	143.....	447
Clark v. Lott, 11 Ill. 144.....	310	Commonwealth v. Rossiter, 2 Bim. 362	747
Clark v. Polk Co., 19 Iowa, 248.....	218	Commonwealth v. Stockbridge, 11	
Clark v. Pinney, 6 Cow. 297.....	519	Mass. 279.....	555
Clark v. Ricker, 14 N. H. 44.....	123	Commonwealth v. Sturtevant, 117	
Clark, Dodge & Co. v. The City of Dav-		Mass.....	450
enport, 14 Iowa, 494.....	222	Commonwealth v. Walden, 8 Cush. 558	551
Clark v. Wethey, 19 Wend. 320.....	531	Commonwealth v. Williams, 110 Mass.	
Clarke v. Morey, 10 Johns. 69.....	845	401.....	551
Clarkson v. Morgan, 6 B. Monr. 448.....	376	Commonwealth v. Wilson, 1 Gray, 387.	446
Clarkson v. Morgan's Devisees, 6 B.		Commonwealth v. Woods, 8 Wright,	
Monr. 441.....	372	118.....	761
Clayton v. Andrews, 4 Burr. 2101.....	623	Comstock v. Hadlyme, 8 Conn. 254....	411
Cleaves v. Fess, 4 Me. 1.....	579	Conderman v. Smith, 41 Barb. 404.....	645
Cleo v. Seaman, 21 Mich. 287.....	534	Congreve v. Evetta, 10 Exch. 298. 647,	654
Cleland v. Taylor, 3 Mich. 201.....	534	Congreve v. Smith, 12 N. Y. 79.....	522
Cleveland v. Davis, 3 Mo. 331.....	94	Conklin v. Thompson, 20 Barb. 218....	523
Cleveland, Painesville and Ashtabula		Conly v. Berson, 1 Helsk. (Tenn.) 145..	346
R. C. & P. R. R. Co. v. Kelley, 5 Ohio		Corkhill v. Landers, 44 Barb. 218.....	535
St. 180.....	332	Corley v. Williams, 1 Bailey, 5-8.....	122
Climmer v. Littler et al., 3 Burr. 1244....	596	Cornellius v. Burford, 28 Tex. 202.....	535
Cloyes v. Hooker, 6 N. Y. Sup. 448.....	293	Corner v. Shew, Ex. (3 Mees. & Wels.)	
Clough v. Davis, 9 N. H. 500.....	122	850.....	369
Coalter v. Bryan, 1 Gratt. (Va.) 18.....	413	Corporation v. Gould, 6 Mass. 44.....	435
Codman v. Freeman, 3 Cush. 306.....	654	Cook v. Boston, 9 Allen, 398.....	513
Cogdell v. Exum, 69 N. C. 464; S. C., 12		Cook v. Tomba, 2 Aust. 420.....	620
Am. Rep. 657.....	195	Cook v. Whipple, 55 N. Y. 150; S. C., 14	
Coggeshall v. Potter, 1 Holmes (U. S.,		Am. Rep. 202.....	125
C. C., 1st c.).....	568	Coombs v. Bristol and Exeter Railway	
Coggs v. Bernard, 2 Ld. Raym. 909.....	615	Company, 3 H. & N. 510.....	633
Cohen v. Morgan, 6 Dowl. & Ryl. 8.....	641	Cooper v. Lovering, 106 Mass. 77.....	558
Cohens v. The State of Virginia, 6		Cooper v. Telfair, 4 Dallas, 11.....	697
Wheat. 397.....	695	Copeland v. Copeland, 23 Me. 525.....	536
Colte v. Soc. of Savings, 32 Conn. 173..	500	Coppock v. Bower, 4 M. & W. 361.....	121
Colburn v. Tolles, 13 Conn. 527.....	553	Costigan v. M. and H. R. R. Co., 2 Den.	
Cole v. Bansemer, 26 Ind. 94.....	239	609.....	613
Cole v. Savage, 10 Paige, 583.....	291	Cotes v. Davenport, 9 Iowa, 227.....	510
Coleman v. Riches, 16 C. B. 104; 29 Eng.		Cotton v. Reed, 2 Wis. 458.....	688
Law and Eq. 323.....	83, 606	Coughenours Adm'rs v. Stanft, 27	
Coles v. Marquand, 2 Hill, 417.....	82	Wright, 195.....	751
Colley v. Westbrook, 57 Me. 181.....	470	County of Cass v. Johnson (Sup. C. &	
Collins, Admr., v. Welser, 12 S. & R. 87	369	U. S. 1877), 16 Ala.....	143
Collins v. Bane, 34 Iowa, 385.....	232	Courtright v. Stewart, 19 Barb. 455....	625
Collins v. Blantern, 2 Wils. 347.....	120	Cowan v. Adams, 10 Me. 374.....	578
Colony v. Dublin, 32 N. H. 432.....	496	Cowan v. Iowa State Ins. Co., 40 Iowa	
Collins v. Ins. Co., 17 Ohio St. 215.....	179	St. 551; 20 Am. Rep. 583.....	294
Collins v. Love, 7 Blackf. 416.....	637	Cowdrey v. Colt, 44 N. Y. 362.....	657
Commonwealth v. Allegheny County		Cox v. Hickman, 99 E. C. L. 47.....	399
Commissioners, 8 Casey, 223.....	747, 748	Craft v. Jackson Co., 5 Kan. 513.....	269
Commonwealth v. Canal Commission-		Craig v. Kline, 15 P. F. Smith, 413....	740
ers, 2 Penn. St. 518.....	747	Craig v. Murgatroyd, 4 Yeates, 168....	743
Commonwealth v. Councils of Pitts-		Cramer v. Lepper, 26 Ohio St. 50; S. C.,	
burgh, 10 Casey, 509.....	747	20 Am. Rep. 756.....	291, 293
Commonwealth v. Curren, 3 Pittsb. 143	487	Crane v. Reeder, 28 Mich. 527; 15 Am.	
Commonwealth v. Dorsey, 103 Mass.		Rep. 223.....	80
412.....	449	Cranston v. Smith, 16 Alb. L. J. 330....	68
Commonwealth v. Eastman, 1 Cush.		Cranston v. Crane, 97 Mass. 459.....	145
223.....	721	Crapo v. Stetson, 3 Metc. 394.....	425
Commonwealth v. Fairbanks, 2 Allen,		Crawford v. Bark Caroline Reed, 42	
511.....	446	Cal. 469.....	401
Commonwealth v. Gilney, 2 Allen, 150.	551	Crease et al. v. Babcock et al., 10	
Commonwealth v. Harris, 23 Penn. St.		Metc. 545.....	50
(10 Harris) 253.....	727	Creighton v. Toledo, 18 Ohio St. 447....	325
Commonwealth v. Haskell, 2 Brewst.		Crisdee v. Bolton, 3 Carr. & P. 240....	566
491.....	444	Crocker v. Bellangee, 6 Wis. 645.....	699
Commonwealth v. Henry, 13 Wright,		Crofoot v. Bennett, 2 N. Y. 256.....	696
538.....	747	Cromwell v. Delaplaine, 5 N. Y. Leg.	
Commonwealth v. Hunt, 4 Metc. 123....	723	Obs. 226.....	233

TABLE OF CASES CITED.

xvii

	PAGE.		PAGE.
Crookshank v. Barret, 13 Johns. 55.	592	Diver v. Cedar Falls, 31 Iowa, 505.	218
Crosby v. Wyatt, 23 Me. 156.	593	Dix v. Mercantile Ins. Co., 22 Ill. 372.	295, 297
Crowder v. Shankleford, 35 Miss. 309.	309	Dix v. Van Wyck, 2 Hill, 502.	291
Cummins v. Kennedy, 2 Littlel. 123.	597	Donn v. Lippmann, Clark & Fin. 1.	307
Cummins v. Wire, 6 N. J. Eq. 73.	390	Dooley v. Wood, 5 Johns. 124.	10
Cunningham v. Lyness, 23 Wis. 243.	715	Dorman v. Jacksonville, 13 Fla. 380.	510
Curran v. The State of Arkansas, 15 How. (U. S.) 304.	326	Dorsey v. Gassaway, 2 Harr. & Johns. 402, 413.	205
Curtis v. Deering, 13 Me. 501.	597	Dorscholmer v. Bucher, 7 Serg. & H. 9.	310
Curtis v. Martin, 20 Ill. 557.	94	Downman v. Jones, 4 Q. B. 285.	179
Cusack v. Robinson, 1 Lond. Jurist, 543.	594	Downie v. White, 13 Wis. 170.	300
Cushing v. Drew, 37 Mass. 445.	594	Downs v. Hawley, 113 Mass. 297.	309
Cushwa v. Cushwa, 5 Md. 44.	125	Downing v. Marsha I. 23 N. Y. 200.	184
Cutler v. Howard, 9 Wis. 300.	707	Draper v. Massachusetts Steam Heating Co. 5 Allen, 205.	179
Dairyville v. Dairyville, 3 Hagg. Const. Rep. 44.	590	Draper v. Treacott, 20 Barb. 401.	300
Dalby v. India Life Insurance Co., 15 O. B. 305.	741	Drake v. Flewellen, 83 Ala. 106.	179
Dakin v. Williams, 17 Wend. 447.	594	Drake v. Henly, Walk. 543.	94
Dapkins v. Stevens, Lemas, 19 Ohio, 220.	344	Draper v. Atlas Insurance Co., 18 Mo. 125.	305
Dann v. Cudney, 13 Mich. 290.	595	Dunbar v. Franklin, 10 N. H. 207.	497
Davis v. Davis, 26 Cal. 23.	595	Dundas v. Bowler, 2 McLean 307.	313
Davis v. Dudley & Allen, 597.	737	Dutton v. Marsh, 1. H. 1 Q. B. 561.	179
Day v. Finn Owen, 133.	702	Dunovan v. Wilson, 26 Barb. 125.	306
Davis v. Moore, 13 Me. 424.	579	Dornett v. Beckford 5 B. & Ad. 581.	605
Davidson v. Stillman 24 La. Ann. 223.	595	Downs v. Skillinger 23 Wend. 270.	594
Dearborn v. Twist, 6 N. H. 44.	593	Dows v. Green 24 N. Y. 535.	605
Delaplaine v. Hitchcock 6 Hill, 14.	594	Dressler v. Davis, 7 Wis. 527.	715, 716
Delaware Ins. Co. v. Archer, 8 Rowle, 229.	742	Drexel v. Man, 1 W. & A. 294.	747
Dispatch Line of Packets v. Bellamy Manuf. Co. 12 N. H. 205.	543	Ducat v. Chicago, 14 Wall. 500.	701
Dobell v. Hutchinson 3 A. & E. 355.	579	Duffy v. Shucky 11 Ind. 70.	594
Doe v. Pritchard 118 & M. 327.	595	Duncan v. Duncan 4 Ind. 317.	536
Duestein v. Rosser, 3 East. 15.	594	Duncomb et al. v. Bunker, 2 Moto. 8.	506
Doe v. Walters 16 Ala. 714.	590	Dunnell v. Pike, 11 Moto. 551.	540
Dole v. Warren, 21 Me. 94.	590	Durham v. Alden, 20 Me. 238.	530
D'Arcy v. Ketchum 11 How. 3. O. 105.	590	Dutcher v. Dutcher 30 Wis. 651.	707
Darling v. Westmoreland 52 N. H. 401.	522	Duval v. Craig 2 Wheat. 45, 620.	597
Darling v. Wooster 9 Ohio St. 517.	392	Dwinnel v. Brown, 54 Me. 404.	539
Dart v. Walker 4 Daly, N. Y. 155.	90		
Dart v. McKinney, 9 Har. 167.	394	Hadie v. Shimmer, 20 N. Y. 9.	519
Dash v. Van Kleeck, 7 Johns. 477.	170	Bagleton v. Kingston, 8 Ves. Jr., 450.	445
Davis v. Christian, 15 Cratt. 11.	595	Eaton v. Bell, 6 Har. & Ald. 84.	179
Davis v. The Mayor of New York, 3 Duer, 163.	397	Eastman v. Clark, 53 N. H. 276.	397
Dean v. King 22 Ohio St. 115.	39	Eastman v. Meredith, 4 N. H. 384.	471
Dean v. Nelson, 10 Wall. 155.	343	Easter v. Minard, 26 Ill. 494.	84
Debell v. Torworthy 9 B. Monr. 299.	371	Easter v. White 12 Ohio St. 219.	394
Deering v. Sawtel 4 Greenl. 191.	94	Eastern R. R. Co. v. Benedict, 10 Gray, 212.	523
Delannay v. Barnett, 4 Trin. 454.	39	Eddy Street Foundry v. Camden Ins. Co. 1 Chf. 300.	394
Delhi v. Youmans, 50 Barb. 116.	480	Edge v. McLaughlin & Whart. 170.	749
Delland v. Collins, 2 Cratt. 343.	270	Edgely Hart 5 Seld. 217.	605
Demarest v. Harring 6 Cow. 76.	304	Edgerley v. Swain, 22 N. H. 478.	640
Denn v. Allen, 1 Penning N. J. 20.	413	Egery v. Woodard 5 Me. 45.	574
Dermant v. Home Mut. Ins. Co. 26 La. Ann. 55, 21 Am. Rep. 544.	294	Edson v. Weston 15 W. 278.	605
Dermott v. Detroit 4 Mich. 451.	510	Edward v. Elliott 21 Wall. 522.	406
Detroit v. Beckman, 34 Mich. 130.	511	Edward v. Grand Trunk Railway Co., 46 Me. 57.	634
Detroit v. Corey, 9 Mich. 162.	511	Richon v. Le Maître, 3 Wils. 307.	558
De Vallentin, Admr. v. Duffy, 14 Peters, 225.	395	Hillott v. Jackson, 3 Wis. 648.	243
Dever v. Steamboat Hope 42 Miss. 716.	403	Hillott v. Piarol, 1 Pet. 225.	353
Dew v. Clark, 3 Adams, 79.	447	Hills v. Wild, 6 Mass. 281.	533
De Wolf v. Johnson 10 Wheat. 397.	209	Kilmaker v. Franklin Fire Ins. Co., 6 W. & A. 430.	742
De Witt v. Barly, 15 N. Y. 340.	450	Emerson v. Lowell Gas-light Co., 8 Allen, 145.	505
De Witt et al. v. Walton, 5 Seld. 571.	178	Emerson v. McNamara, 41 Me. 565.	348
Dial v. Holter, 6 Ohio St. 228.	303	Emery v. Mariaville, 65 Me. 215.	501
Diamond v. Lawrence County, 31 Penn. 37.	376	Emery v. Prescott, 54 Me. 200.	543
Dixon v. Baker, 63 Ill. 316.	510	Erhman v. Kindrick, 1 Moto. (Ky.) 145.	575
Dickinson v. Barber, 8 Mass. 285.	445	Erie Bank v. Smith, Randolph & Co., 3 Brewst. 9.	40
Dickinson v. Dickinson, 61 Penn. 29.	440	Retheridge v. Ball, 7 Port. 47.	747
Dickinson v. Lovell, 20 N. H. 264.	400	Evans v. Montgomery, 4 Watts & S. 213.	494
Dispatch Line v. Bellamy Mfg. Co. 12 N. H. 205.	190	Evans v. Walton, L. & R. 3 O. P. 615.	405
		Everett v. Continental Ins. Co., 21 Minn. 70.	264
		Everett v. Salton, 13 Wend. 474.	525
		Evings v. French, 1 Mass. 170.	520

	PAGE.		PAGE.
Exchange Bank of Columbus v. Hines, 3 Ohio St. 27	281	Fowler v. Pohrig, 6 Barb. 125	287
Exchange Bank v. Rice, 107 Mass. 27;	300	Fox v. Penn Mutual Life Ins. Co., 4 Bigelow & Life R. 445	740
3 Am. Rep. 1.	300	Fox v. Whitney 14 Mass. 114	94
Ex parte Burnett, 20 Ala. (N. S.) 441	289	Fragnano v. Long, 4 B. & C. 219	289
Ex parte Robinson, 3 Wis. 280	60	Franklin Bank v. Pratt, 31 Me. 501	94
		Fraser v. McCord, 1 Carter (Ind.) 204	289
Fair v. Howard, 6 New 304	600	Fraser v. Brown 114 10 St. 304	489
Fairchild v. Bently, 30 Barb. 147	601	Frederick v. Campbell, 13 B. & R. 125	740
Falkner v. Hunt, 16 Cal. 167	612	Freeman v. Brittain, 2 Harr. 191	60
Farley v. Banks, 4 Ell. & Black. 497	162	Freeman v. Buckingham, 14 How. 120	612
Farlie v. Banks, 30 Eng. Law & Eq. 115	612	Freeman v. Freeman, 43 N. Y. 24; 3 C. 3 Am. Rep. 665	60
Farmers' Loan and Trust Company v. Commercial Bank, 11 Wis. 207	614	Fremont v. Crippen, 10 Cal. 211	747
Farmers' Loan and Trust Company v. Harmony Fire Insurance Co., 11 Barb. 13; 41 N. Y. 619	284	French v. Loyal Co., 5 Leigh. 487	273
F & M Bank v. Kimmel, 1 Mich. 24	289	Fren v. Shotwell, 5 Johns. Ch. 616	281
F & M Bank v. Wilson, 10 Watts 201	289	Fretz v. Stover, 21 Wall. 196	282
Farrell v. Palmer, 20 Cal. 147	289	Frisbee v. Hoffnagle 11 J. R. 30	607
Fasnacht v. Frank, 21 Wall. 418	60	Fricker v. Tomlinson, 1 Man. & Gr. 729	601
Fayer v. Boston & Lowell R. R. Co., 19 Am. Rep. 394	289	Frontier Bank v. Morse, 23 Me. 85	289
Fay v. Parker, 44 N. H. 245	489	Fuller v. Duren, 26 Ala. 73	281
Fay v. Valentine, 12 Pick. 66	289	Fulton, Admrs. v. Fulton, 44 Barb. 241	614
Fellows v. School District, 20 Me. 289	289	Fyson v. Kitson, 20 R. L. & Eq. 274	279
Fellows v. Steamers Powell and Pio- neers, 10 La. Ann. 230	28	Gachet v. McCall, 50 Ala. 207	289
Fenton v. Head, 4 Johns. 51	289	Gabraith v. Gabraith, 6 Watts. 119	740
Ferris v. Crawford, 3 Den. 285	284	Gale v. Burnell, 7 Q. B. 560	614
Fielder v. Varner, 45 Ala. 429	289	Gale v. Eastman, 7 Mete. 14	289
Filkins v. Brookway, 19 Johns. 170	289	Gale v. Nixon, 6 Cow. 445	279
Findley v. People, 1 Mich. 284	289	Galena & Chicago Union R. R. Co. v. Jacobs, 20 Ill. 478	130
Finn v. Donahue, 26 Conn. 218	281	Gallwey v. Maxwell 24 L. & R. 428	284
Finnell v. Nesbitt, 16 B. Monr. 281	281	Galpin v. Chitchlow 13 Am. Law Rep. N. S. 137, 3 C. 114 Mass. 220	614
Finley v. Looming Co. Mutual Insur- ance Company 20 Penn. 84 813	289	Galpin v. Page, 18 Wall. 350	282
Fiquet v. Allison, 12 Mich. 320	289	Galsworthy v. Strutt, 1 Easch. 660	282
First M. E. Church v. The City of Chi- cago, 20 Ill. 462	289	Galveston R. R. Co. v. Cowdrey, 11 Wall. 40	614
First National Bank of Toledo v. Shaw, 61 N. Y. 283	600	Gambush v. Howe, 14 Me. 260	289
First National Bank, etc. v. Watkins, 31 Mich. 463	289	Garbutt v. Watson, 3 B. & A. 613	614
First Nat. Bank v. Whitman, 94 U. S. 243	289	Gardner v. Flagg, 4 Mass. 101	289
Fish v. Gray, 11 Allen, 123	289	Gardner v. Joy, 9 Mete. 177	289
Fisher v. True, 38 Me. 524	289	Gardner v. Kestel, 3 Hill, 320	607
Fitch v. Chapman, 30 Conn. 5	94	Gardner v. Maxey v. B. Monr. 80	289
Fitch v. Lemon, 28 U. Law, Q. B. 273	289	Gardner v. McEwen, 19 N. Y. 123	614
Fitchburg Railroad Co. v. Charlestown Insurance Co., 7 Gray, 64	289	Garland v. Britton, 12 Ill. 227	289
Fitzgerald v. Forristal, 48 Ill. 229	122	Garrett v. Wiggins 1 beam 235	179
Fitzhugh v. Fitzhugh, 11 Gratt. 300	279	Garrison v. Donaldson 15 B. Monr. 287	271
Fleetwood v. City of N. Y., 2 Sandf. 476	612	Gates v. Houston 1 Tex. 423	289
Fleming v. Orr 2 Macy B. L. Cas. 14	601	Gaylor v. Wilder, 10 How. 494	60
Fleming v. Page, 11 How. 603	284	Gault v. Willis 28 Penn. 250	94
Floyd v. Johnson, 2 Lat. 100	145	Gelcke v. The State 13 Tex. 504	614
Floyd v. Wiley 1 M. 643	289	Gentry v. Hoyt 1 Wheat. 245	601
Floyer v. Edwards, Camp. 113	287	Georgiana Co. v. Elliott Taney, 120	289
Florida v. Gibbs, 13 Fla. 65. 8 C., Am. Rep. 223	279	Gerwig v. Shetterly 64 Barb. 620	289
Fogg v. Fagg, 31 Me. 302	289	Gibson v. Dougherty 10 Ohio St. 286	271
Fogg v. Virgin, 19 Me. 352	179	Gibson v. Ogden v. Wheat, 1	60
Follett v. Hoyer, 4 Ohio St. 601	212	Gibbs v. Crulshank, 6 C. P. 454	289
Ford v. Cratty, 53 Ill. 113	122	Gibbs v. Hale & Watts 255	614
Forrest v. Collier, 20 Ala. 170	607	Gier v. Denton, 71 N. C. 341	289
Forrest v. Mayor of N. Y., 13 Abbot, 289	612	Giff v. Hill, 2 C. & M. 520	289
Forster v. Fuller, 4 Mass. 88	279	Gibbs v. Boardman, 20 Me. 79	271
Fosbair v. Ferguson, 3 Den. 617	600	Gibbs v. The Penn. R. R. Co., 50 Penn. St. 120	114, 120
Fosbair v. Ferguson, 5 Hill, 124	289	Gill v. Smith, 29 Ill. 413	145
Fosbair v. Glen Haven, 25 Wis. 280	289	Gilman v. City of Shetoygan 2 Black. 513	79
Fosbair v. Glen Haven, 3 Am. Rep. 73	600	Gilman v. Hill 26 N. H. 311	607
Foster v. Bigelow, 24 Iowa, 279	600	Gilman v. Lacinta 50 N. H. 129	614
Foulger v. Newcomb, L. R. 2 Exch. 287	284	Gilmer v. Lime Point 10 Cal. 220	740
Fountain v. Havenel, 17 How. 289	120	Gilman v. Roland L. R. 14 P. 1	279
Fowler v. Ashinon, 6 Minn. 289	279	Gilman v. Davis 24 Ala. 280	284
		Gilman v. Hays, 4 Dana (Ky.) 58	289
		Gilman v. Woodruff, 2 Allen, 227	241, 242
		Glen v. Glen 18 & R. 498	740
		Gilford v. Binney, 115 Mass. 40	600
		Gilford v. Grand Trunk R. R. Co., 57 Me. 32	489
		Goddard v. The Merchants Bank, 4 N. Y. 147	111

TABLE OF CASES CITED.

xix

PAGE.	PAGE.
Goodman v Chase, 1 B. & Ald. 297 ... 394	Hamilton v Hamilton, 2 Rich. Eq. 808. 10
Goodrich v Jenkins, 4 Ohio, 43 ... 351	Hamilton v Merrill 25 Ohio, 11 ... 404
Goodrich v Jenkins, 6 Ohio, 44 ... 354	Hamilton v Rodgers 5 Md. 201 ... 658
Goodtitle v Welford 1 Doug. 139 ... 409	Hamlin v Hamlin 19 Me. 141 ... 594, 598
Gorham v Carrou 3 Latt. 221 ... 90	Hammitt v Philadelphia 1 B. H. Smith 146 ... 702
Gordon v Longest, 16 Pet. 97 ... 605	Hampton v McLean J. Wheat 231 ... 240
Gordon v West, 8 N. H. 444 ... 409, 415	Hanger v Abbott 6 Wall. 52 ... 340, 350
Goslin v Wilcock, 2 Wils. 302 ... 607	Hannay v Eys 4 Cranch 242 ... 590
Gosselin v Donaldson, 18 B. Monr. 387 ... 374	Harding v Carter Park on Ins. 4 ... 611
Gould v Mather, 104 Mass. 263 ... 145	Harding v Mott, 2 Penn. St. 409 ... 94
Goss v Cather 23 Ill. 634 ... 130	Harlan v The State, 11 Mass. 505 ... 344
Goss v White, 23 W. & 20 ... 609	Harmon v Bingham, 12 N. Y. 99 ... 519
Governor, etc. v Meredith 4 T. R. 34 ... 508	Harris v Hardeman, 14 H. & C. 324 ... 351
Governor v McKee, 3 Hawks. 226 ... 558	Harris v Warner, 14 Wend. 401 ... 346
Grant v Norway 101 B. 695 ... 21, 610	Harrison v Seaper 5 Law Times Rep. N. 4 640 ... 600
Grantham v Hawley, Hobart 142 ... 646	Harrison v North, Cases in Chan. 63 ... 346
Graf v Pittsburgh and Steubenville Railroad Co., 31 Penn. St. 459 ... 307	Harrington v Wade 22 Barb. 161 ... 371
Grand Trunk Railroad and Banking Co. v Bryan 4 S. & M. 211 ... 88	Harshman v Bates County 22 U. S. 582 ... 142
Granger v Granger, 6 Ohio, 45 ... 513	Hart v Aldridge, Comp. 54 ... 458
Green v Biddle, 8 Wheat. 1 ... 390	Hart v McIntosh 1 Esp. 205 ... 96
Green v Button, 3 Cr. M. & R. 707 ... 400	Hartford Fire Ins. Co. v Doyle J. Cout. 1, & J. 31 ... 608
Green v Kemp, 11 Mass. 215 ... 309	Hartford Fire Insurance Co. v Ross, 23 Ind. 181 ... 306, 307
Green v School District, 57 Penn. St. 423 ... 410	Hartley v Harwood 24 N. Y. 170 ... 301
Green v. Van Buekirk, 7 Wall. 120 ... 20	Hartley v Herring 5 Tenn. Rep. 134 ... 300
Green v. Waggoner, 2 Hilt. 207 ... 618	Hartshorn v Rome, 2 Disney 15 ... 600
Greene v. Harriman, 14 Me. 20 ... 606	Hartshorn v Smith 5 U. S. 274 ... 64
Greene v. Morse, 4 Barb. 200 ... 301	Harsco v Whitman 19 Me. 102 ... 70
Greene v. Tyler & Co., 30 Penn. St. 331 ... 300	Hassan v Barrett 115 Mass. 258 ... 500
Greenleaf v Francis, 14 Pick. 117 ... 409	Hastings v Beckwith 1 Denio, 190 ... 62
Greenaby v. Wilcock, 2 Johns. 1 ... 600	Hatch v Bates, 54 Me. 146 ... 606
Greenbault v Davis, 4 Hill. 642 ... 600	Hatch v Dennis 10 Me. 244 ... 94
Gregg v. Crosswell, 10 Adol. & Ellis, 489 ... 394	Hatch v Kimball 14 Me. 146 ... 594
Griffey v The Lafayette, Birmingham and Mississippi Railway Co. 11 Ill. 220 ... 91	Hatch v Toledo, Wabash & Western R. R. Co. 4 Ill. 457 ... 170
Griffin v. Steele, 1 Edmunds ... 147	Hathorn v King 5 Mass. 41 ... 446
Grin v. School District, 57 Penn. St. 424 ... 410	Hawes v. Knowles, 114 Mass. 518 ... 452
Grinnell v. Lowden, 11 Ohio St. 249 ... 604	Hawkins v. Pihl 24 Ark. 206 ... 344
Grist v. Hodges, 3 Dev. 300 ... 607, 604	Hawley v. James, 5 Paige, 487 ... 145
Griswold v. Haven, 26 N. Y. 604, 605 ... 600	Hays v. People 25 N. Y. 300 ... 612
Griswold v. Waddington, 15 Johns. 87 ... 610	Hays v. Hogan 5 Cal. 241 ... 612
Griswold v. Waddington, 16 Johns. 630 ... 616	Hays v. Younglove 7 B. Monr. 345 ... 607
Grover & Baker Sewing Machine Co. v Butler, 25 Ind. 454, 21 Am. Rep. 200 ... 67	Haynes v. Niles 100 Mass. 327 ... 679
Gustine v. VanGorder, 10 Mich. 600, 604 ... 639	Haynes v. Haynes, 29 Me. 247 ... 680
Gutlander v. Howell, 26 N. Y. 657 ... 612, 610	Hazard v. Chicago & N. W. R. R. Co. 4 Ill. 453 ... 79
Gutlaudet v. Hall, 26 N. Y. 657 ... 610	Hazard v. Haskell 27 Me. 49 ... 608
Gunter v. Astor 4 J. B. Moore, 12 ... 420	Heard v. Hall 6 Pick. 437 ... 604
Guy v. Hull, 8 Murph. 150 ... 95	Hefner v. Commonwealth 4 Casey, 112 ... 747
Guy v. Washburn, 28 Cal. 111 ... 613	Hefner v. Vandolah 22 Ill. 398 & O., 11 Am. Rep. 19 ... 110
Hadley v. Mayor of Albany, 33 N. Y. 600 ... 379	Hefner v. First National Bank 43 Ind. 107 & Am. Rep. 307 ... 70, 67
Hagerty v. Arnold, 13 Kan. 357 ... 379	Henderson v. Anders 11 How. 73 ... 94
Hagerty v. Pagan, 3 Penn. 533 ... 708	Hendy v. Seale, Dundy 401 ... 621
Hale v. Pierce, 23 Md. 187; 4 Am. Rep. 120 ... 179	Hendy v. Lyons Regs. 1 Bing. N. O. 221 ... 400
Halley v. Wheeler, 4 Jones' Law, 150 ... 379	Hercule v. Gilman 21 La. Ann. 243 ... 646
Halle v. Smith, 1 Bos. & Pull. 543 ... 608	Henry v. Chester 15 Vt. 400 ... 600
Haines v. Dennett, 11 N. H. 190 ... 93	Henry v. Horstak 9 Watts. 412 ... 600
Haines v. Haines, 6 Md. 426 ... 88	Henry v. Rutland & Burlington R. R. Co., 27 Vt. 435 ... 91
Hale v. Skinner, 117 Mass. 634 ... 604	Henry v. Vermillion and Ashland R. R. Co. 17 Ohio 15 ... 308
Halford v. Kymor, 10 B. & C. 524 ... 741	Hewshaw v. Bank of Belknap Falls 22 Gray 408 ... 604
Hall v. Barrows, 10 Jur. (U. S.) 150 ... 45	Hentz v. Idaho 1 U. S. D. Ct. 2 D. N. Y. 11, 18, 1 ... 600
Hall v. Cazenove, 4 East, 47 ... 674	Hepburn v. Sewell 5 H. & J. 211 ... 48
Hall v. Edrington, 8 B. Monr. 4748 ... 306	Herd v. Young 51 Conn. St. 175 ... 303
Hall v. Jenness, 6 Kan. 303 ... 290	Heresy v. Merchants National Bank 34 Ind. 39 ... 70
Hall v. Jones, 5 Pick. 441 ... 548	Hershey v. Shipman, 5 B. & C. 223 ... 614
Hall v. Ricketta, 9 Barb. 301 ... 80	Herring v. Tighman 11 Wed. 300 ... 614
Hall v. Suydam, 6 Barb. 66 ... 607	Hershey v. Keenborts 6 Barr. 128 ... 710
Hall v. Williams, 28 Pick. 237 ... 346	Hesmer v. Harris 4 Ill. 425 ... 197
Halliday v. Ward, 3 Camp. 21 ... 301	Hoyer v. Deares, 2 Johns. Ch. 154 ... 146
Halloran v. Whitcomb, 41 Vt. 300 ... 506	
Halterline v. Rice, 68 Barb. 508 ... 604	
Ham v. Miller, 20 Iowa, 450 ... 202	
Hamilton v. Labuker, 51 Ill. 416 ... 60	

	PAGE.		PAGE
Heywood v. Outhbert, 4 McCord, 354....	640	Hungerford's Bank v. Dodge, 30 Barb.	208
Hezekiah B. Lord et al. v. Wm. Tiffany, 614		626....	208
Hickey v. Boston & Lowell Ry. Co., 14		Hunnewell v. Charlestown, Mass. 350.	513
Allen, 429.....	114	Hunt et al. v. Weir, 29 Ill. 83.....	92
Hicky v. R. R. Co., 14 Allen, 429.....	715	Hunt v. Amidon, 4 Hill, 345.....	657
Higginson v. Weld, 14 Gray, 165....	583	Hunt v. Brooklyn, 35 Barb. 226.....	470
Hill v. Boyland, 40 Miss. 618.....	344	Hunt v. Bullock, 23 Ill. 320.....	654
Hill v. Henry, 17 Ohio, 9.....	322	Hunt v. Edwards, 4 Harris & J. 283....	93
Hills v. Bannister, 8 Cow. 81.....	176, 179	Hunt v. Hecht, 8 Exch. 814.....	638
Hilton v. Houghton, 35 Me. 143.....	182	Hunter v. Earl of Hopetown, 4 Mo-	
Hinesburg v. Sumner, 9 Vt. 23.....	122	Queen, H. of L. 972.....	371
Hinkley v. Arey, 27 Me. 362....	578, 579	Hunter v. Parker, 7 M. & St. 322.....	543
Hitchcock v. Aicken, 1 Caines, 400....	345	Huntington v. Texas, 13 Wall. 650.....	354
Hoback v. Kilgore, 21 Am. Rep. 317....	750	Hume v. New York, 47 N. Y. 646.....	470
Hobbs & Henley v. Memphis Insurance		Hume v. The Mayor, etc., of New York,	
Co., 1 Sneed, 444.....	205	46 N. Y. 639.....	429
Hodges v. Buffalo, 3 Denio, 110.....	215	Humphrey v. Reed, 6 Whart. 485.....	605
Hodges v. King, 7 Metc. 583.....	582	Hurd v. Cushing, 7 Pick. 169.....	534
Hoffman v. Aetna Ins. Co., 82 N. Y. 406,	205	Huston v. Stringham, 21 Iowa, 38.....	289
301		Hutchinson v. Ford, 15 Am. Rep. 711..	649
Hoffman v. Bank of Milwaukee, 12		Hyzer v. Stoker, 3 B. Monr. 117.....	365
Wall. 181.....	105		
Hogan v. Sharpe, 7 C. & P. 755.....	601	Illinois Central R. R. Co. v. McKee, 43	
Holbrook v. Conner, 60 Me. 578.....	558	Ill. 119.....	117
Hollingsworth v. Shaw, 19 Ohio St. 430.	303	Imler v. Springfield, 53 Mo. 119.....	510
Hollowbush v. McConnell, 12 Ill. 203....	78	Inge v. Murphy, 9 B. Monr. 117.....	366
Holloway v. Sherman, 12 Iowa, 283....	494	Inge v. Murphy, 14 Ala. 289.....	366
Holly v. Brown, 14 Conn. 255.....	656	Ingersoll v. Jones, 5 Barb. 661.....	104
Holroyd v. Marshall, 10 H. L. Cases,		Ingraham v. Geyer, 13 Mass. 146....	312, 319
191.....	649	Inhabitants, etc., v. Baton, 11 Mass.	
Holyoke Bank v. Burnham et al., 11		368.....	125
Cush. 187.....	50	In re Eilla, 1 Bankr. Reg. 555.....	274
Holme v. Hammond, 7 Law, 218.....	399	In re Everitt, 9 Bankr. Reg. 90.....	274
Home Life Ins. Co. v. Dunn, 20 Ohio		In re Hambricht, 2 Bankr. Reg. 493....	274
St. 175; 5 Am. Rep. 642.....	80	In re Robinson, 2 Bial. 309.....	70
Hooper v. De Long, 5 Jones & S. 127....	293	In re Stevens, 5 Bankr. Reg. 298.....	274
Hooper v. Emery, 14 Me. 375.....	222	Insurance Company v. Bailey, 13 Wall.	
Hoover v. Pierce, 26 Miss. 627.....	125	619.....	184
Hope v. Hayley, 5 Ell. & Black. 830..	647	Ins. Co. v. Dunn, 19 Wall. 214.. 80, 438,	695
Horn v. Lockhart, 17 Wall. 570....	344, 354	Ins. Co. v. French, 18 How. 404.....	701
Hornby v. Cramer, 12 How. 490.....	613	Ins. Co. v. Morse, 20 Wall. 445.....	695
Horner v. Neves, 7 Bing. 743.....	174	Insurance Company v. Moseley, 8 Wall.	
Horsley v. Brooks, 20 Ia. 115.....	306	397.....	594
Hotchkiss v. Newton, 10 Ga. 560.....	332	Irving v. Viana, 2 Y. & Jer. 71.....	616
Hough v. Horsey, 36 Md. 181; S. C., 11			
Am. Rep. 494.....	290	Jacobs v. Whitcomb, 10 Cush. 255.....	594
Houghtaling v. Kelderhouse, 3 Barb.		James v. Commissioners, 1 Harris, 75..	747
150; S. C., 1 N. Y. 530.....	238	James v. Oakley, 1 Abb. Hr. 324.....	391
Houghton et al. v. The Manufactur-		James v. Stull, 9 Barb. 482.....	494
ers' Fire Ins. Co., 8 Metc. 114....	250	Jamison v. Milliman, 3 Duer, 265.....	644
Houghton v. First Nat'l Bank, 26 Wis.		Jaquith v. Hudson, 5 Mich. 123....	584
608; 7 Am. Rep. 107.....	179	Jackson v. Bartlett, 8 Johns. 361.....	156
Hovey v. Magill, 3 Conn. 680.....	179	Jackson v. Claw, 18 Johns. 347.....	248
Howards, Adm'r, v. Powers, 6 Ohio, 92.	399	Jackson v. Dominick, 14 Johns. 435....	291
Howard v. Kentucky, and Louisville		Jackson v. Hammond, 2 Caine's Cases,	
M. Ins. Co., 13 B. Monr. 285.....	494	337.....	185
Howard & Ryckman v. The Albany		Jackson v. Henry, 10 Johns. 185.....	291
Ins. Co., 3 Denio, 301.....	295	Jackson v. Law, 5 Cow. 248.....	612, 617
Howard v. Sexton, 4 Comst. 157.....	579	Jackson v. Leggett, 7 Wend. 377.....	614
Howe v. Plainfield, 41 N. H. 125....	470	Jackson v. Parker, 13 Conn. 342.....	98
Hulse v. Town of Fulton, 9 Am. Rep.		Jackson v. Schoonmaker, 3 Johns. 230,	574
508; S. C., 29 Wis. 226.....	733	Jackson v. Sherman, 6 Johns. 19....	540
Hoxsle v. Providence Mutual Fire Ins.		Jackson v. Vosburgh, 7 Johns. 186....	540
Co., v. 6 R. I. 517.....	295	Jeanes v. Wilkins, 1 Ves. Sen. 195....	157
Hoyt v. Phillips, 1 Swe. 76.....	613	Jenks v. Lima, 17 Ind. 326.....	513
Hoyt v. The Courts, 23 N. Y. 228.....	23	Jenks v. Mathews, 31 Me. 818.....	559
Hubbersty v. Ward, 18 Eng. L. and		Jenner v. Smith, Law Rep., 4 C. P. 270.	629
Eq. 551.....	606	Jerome v. Bigelow, 66 Ill. 452.....	175
Hudson v. Comm'rs of Atchison Coun-		Jersey City v. Riker, 20 Am. Rep. 386..	519
ty, 12 Kan. 140.....	205	Jessel v. Bath, L. R., 2 Exch. 267.....	31
Hudson v. State, 46 Ga. 624.....	486	Jeter v. Blocker, 43 Ga. 331.....	479
Hudson v. Young, 25 Ala. 376.....	285	Jewell v. Wright, 20 N. Y. 259.....	298
Hughes v. Stinson, 21 La. Ann. 540....	344	Johnson v. Conv. Bk., 21 Conn. 148....	535
Hine v. McConnell, 2 Jones' Law (N.		Johnson v. Haverhill, 35 N. H. 74....	499
C.), 445.....	414	Johnson v. Hudson R. R. Co., 5 Duer,	
Hulbert v. Grant, 4 T. B. Monroe, 580.	145	21.....	717
Hull & Argalls v. The County of Mar-		Johnson v. Johnson's Admr., Wright's	
shall, 12 Iowa, 142.....	224	Rep. 194.....	349
Hull v. Unger, 2 Abb. (N. S.) 507.....	444	Johns v. Lantz, 63 Penn. St. 224.....	282

TABLE OF CASES CITED.

xxi

	PAGE.		PAGE.
Johnson v. Monell, 1 Woolw. 320.....	80	Kurts v. Hibner, 65 Ill 514; 6 C. & A. 8 Am Rep. 605.....	140
Johnson v. E. R. Co., 20 N. Y. 73.....	715	Kyle v. Mallo, 8 Ind 24.....	220
Johnson v. Smith, 31 Conn 257.....	120	Kyle v. Wells, 17 Penn St 26.....	220
Johnston v. The People, 31 Ill. 680.....	121		
Jolly v. Terre Haute Bridge Co., 4 Mo-Loan, 257.....	620	Lacour v. New York, 3 Duer, 408.....	500
Jones v. Caswell, 3 Johns. Cas. 20.....	910	La Chevelier v. Lynch, Doug. 170.....	312
Jones v. Chamberlain, 30 Vt. 190.....	923	La Farge v. Herter, 9 N. Y. 241.....	220
Jones v. Gwynn, 10 Mod. 314.....	640	Ladd v. Wiggin, 6 N. H. 431.....	220
Jones v. Hoar, 5 Pick 2-5.....	241, 243	Lake v. Milken, 62 Me 240.....	520
Jones v. Larrabee, 47 Me. 474.....	418	Lampert v. Case, 10 Rep. 44.....	58
Jones v. Tarleton, 9 M. & W. 673.....	616	Lamb v. Crafts 17 Metc 353.....	630
Jones v. Walker, 2 Penn. 600.....	244	Lambert v. St. Louis, 15 Mo 610.....	510
Jordaine v. Lashbrook, 7 T. R. 601; 1 Phil. Evid. 20.....	95	Lane v. Grumble 12 Pick 177.....	716
Jose v. Baker, 37 Me. 445.....	501	Lane County v. Oregon, 7 Wall 77.....	620
Joseph v. Higelow, 4 Cush. 32.....	514	Langhoff v. Railway Co., 19 Wis 421.....	716
Joseph v. Knox, 3 Camp 280.....	600	Langton v. Horton 1 Hare 549.....	651
Judge of Probate v. Stone, 44 N. H. 600 443	443	Lansing v. Van Alstyne 2 Wend 564.....	600
Judge of Probate v. Stone, 44 N. H. 600 443	443	Largo v. Pennsylvania, 6 N. & R. 400.....	716
Junction R. R. Co. v. Harpold, 19 Ind. 317.....	530	Lark v. Saginaw County 11 Mich. 86.....	510
		Lasere v. Rocheau, 17 Wall 437.....	640
Kaley v. Shad, 10 Metc. 317.....	600	Latham v. Clark 25 Ark 74.....	340
Kanaga v. Taylor, 7 Ohio St. 134.....	819	Laughlin v. Lorenz 48 Pa 275.....	265
Kanouse v. Martin, 15 How 120.....	600	Lawrence v. Chase 54 Me 198.....	500
Kansas Pacific R. R. Co. v. Commis- sioners		Lawrence v. Davis, 1 M. Loan, 177.....	310
Keeler v. Niagara Fire Insurance Co., 18 Wis 228.....	205	Lawrence v. Parker 1 Mass 191.....	620
Keener v. Orull, 19 Ill. 120.....	222	Leach v. Blow, 8 Bin & M 221.....	170
Kein v. Tupper, 60 N. Y. 630.....	620	Leach v. Nichols, 53 Ill 273.....	84
Keir v. Leeman, 8 Q. B. 300.....	120	Leadbetter v. Farrow M & B. 345.....	176
Kelly v. Tilton, 3 Keyes, 203.....	601	Luther Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140.....	970
Kelly v. D. Ch. Schenectady, 3 Hill, 111 637	637	Leavenworth v. Norton, 1 Kan 423.....	220
Kellogg v. Hughes, 3 Dillon, 307.....	80	Leavenworth v. Rankin, 2 Kan 257.....	218
Kelsey v. Hibbs, 13 Ohio St. 240.....	394, 395	Le Blanche v. London & N. W. R. W. Co. 8 R. 1 C. P. D. 201.....	545
Kendrick v. Davis, 3 Cald. 601.....	438	Lee v. Chase 55 Me 425.....	500
Kennedy v. The Board of Health, 3 Barr 200.....	740	Lee v. Griffin 1 Best and Smith, 273.....	610
Kenner v. Goodloe, 2 Handy, 233.....	600	Lee v. Inhabitants etc., 13 Gray, 470.....	47
Kent v. Agard, 24 Wis. 270.....	712	Lee v. West 47 Ga 311.....	199
Kent v. Gray, 53 N. H. 570.....	604	Leggett v. Etna Ins. Co., 10 Rich. 202.....	252
Kent v. Leahy, 24 Wis. 624.....	712	Leggett v. Hyde 50 N. Y. 773.....	220
Kentucky v. Deulson, 24 How. 60.....	745	Leigh v. Webb 3 Rep. 105.....	620
Kerr v. Shaw, 13 Johns. 222, 471.....	607	Leighton v. Wales 1 Mees. & W 545.....	500
Kill v. Hollister, 1 Wilson, 120.....	700	Leland v. Wilson, 4 Tex 79.....	605
Kilpatrick v. The Penrose Ferrybridge Co., 40 Penn St. 113.....	91	Leroix v. Brown 12 C. B. 801.....	570
Kimberly v. Patchin, 19 N. Y. 200.....	600	Lessee of Stoddard v. Myers, 8 Ohio, 203.....	371, 373
King v. Bray, Cas. Temp. Hard. 600.....	411	Lessee of Le Grange v. Ward, 11 Ohio, 257.....	344
King v. Bristow, 6 Term. 100.....	747	Lester v. Baker, 6 Blackf. 420.....	94
King v. Helsham, 3 B. & Ad. 623.....	747	Lester v. Fugroft 1 Lead Cas. Eq. 625, 734.....	60
King v. Inhabitants of Twynning, 3 B. & Ald 207.....	267	Levy v. Stewart 11 Wall 244.....	244
King v. Richards, 6 Whart 415.....	606	Levy v. Welsh, 2 Edw. Ch 430.....	606
King v. The Free Fishers, 7 East, 223 747	747	Lewis v. Webb, 5 Me 526.....	526
King v. Thompson and Wife, 9 Pet. 204.....	60	Lickbarrow v. Mason, 2 Term Rep 75.....	80
Kinsley v. Balcomb, 1 Barb 121.....	204	Lickbarrow v. Mason, 1 H. & W. Notes, Phil. Ed. 150.....	606
Kinsman v. Kinsman, 1 Russ & Myne, 417.....	272, 374	Liebenstein v. Etna Ins. Co., 45 Ill. 203.....	255
Kirk v. Strickwood, 4 B. & Ad 451.....	120	Liebenstein v. Baltic Ins. Co. 45 Ill 301.....	270
Kirkham v. Martin, 3 B. & Ald. 612.....	304	Lincoln v. Pitch 42 Me 456.....	94
Kirbridge v. McLaughlin, 20 Me. 307.....	607	Linlus v. Melrose 1 H. & N. 17, L. J. (Kx) 316.....	100
Klag v. Hummer, 3 Penn 245.....	145	Link v. Clemens, 1 Blackf. 49.....	120
Klopper v. Broome, 26 Wis 373.....	100	Livingston v. Harris 11 Wend 229, 630, 632.....	220
Knott v. Newcomb, 28 N. Y. 240.....	122	Livingston v. Jordan vol. 10 No. 1, Am. Law Reg 56.....	240
Knickerbocker Life Ins. Co. v. Hill, 6 T. & C 205.....	201	Livingston v. Jordan Chase & Decle- lions 454.....	365
Knight v. Goodyear Rubber Co., 8 Am. Rep. 408.....	600	Livingston v. Rahl, 5 B. & B. 112.....	701
Knight v. Goodyear Co., 25 Conn. 403.....	600	Livingston v. Van Ingen 9 Johns 300.....	97
Knight v. Packard, 3 McCord, 71.....	98	Loan Association v. Stonemeltz, 20 Penn. St. 24.....	91
Knight v. Wall, 3 Dev. & Bat. 9.....	343	Loan Association v. Topeka, 20 Wall 205.....	220
Knowles v. Gas-light and Coke Co., 10 Wall. 50.....	100	Loder v. Hopkins 11 W. 71.....	333
Kohl v. United States, 21 U. S. 207.....	700	Lockhart v. White 18 Tex 102.....	247
Koney v. Ward, 2 How. Pr 205.....	601	Lond v. Charlestown 20 Mass 204.....	513
Kortright v. Cady, 21 N. Y. 301.....	615	Loomis v. Bodell, 11 N. H. 74.....	607
Korts v. Carpenter, 3 Johns 130.....	607	Loomis v. Eaton, 20 Conn. 604.....	200

TABLE OF CASES CITED.

1111

PAGE.	PAGE.
Mills v. Curly, 1 Bow. 150	Murdock v. The Chenango County, 118
Mills v. Curry, 7 Oranoh. 434	Murdock v. Warwick, 4 Gray, 170
Mills v. Graves, 20 Ill. 445	Murphy v. Bottomer, 40 Mo. 67
Miller v. Halsey, 8 Green (N. J.), 89	Murphy v. Dean, 101 Mass. 435
Miller v. Insurance Co., 2 R. D. Smith, 205	Murphy v. Hubert, 4 Harris, 10
Miller v. Millman, 45 Barb. 40	Murphy v. Price, 48 Mo. 317
Millman v. Fehr, 20 Barb. 57	Murray v. Ballou, 1 Johns. Ch. 303, 372
Miller v. Town of Palermo, 12 Men. 14	Murray v. Barney, 24 Barb. 285
Milton v. Moore, 4 C. & P. 430	Murray v. Judson, 9 N. Y. 73
Milton v. Howland, 11 Ala. 122	Murray v. Justice, 9 Wall. 374
Milwaukee & Chicago R. R. Co. v. Hunter, 11 Wis. 100	Murray v. McLane, 3 Car. L. R. 185
Minnett v. Milwaukee & St. Paul R. R. Co., 3 Dillon, 480	Musket v. Hull & Bing, 404
Miners' Ditch Co. v. Ballerbach, 37 Cal. 140	Mut. Life Ins. Co. v. Bowen, 47 Barb. 410
Miners' Trust Co. v. Roseberry, 2 Law & Eq. Rep. 413	Myers v. Davis, 20 N. Y. 400, 403
Minor v. The Bank of Alexandria, 1 Pet. 45	Myer v. Progg, 7 Fla. 320
Minturn v. Larus, 20 How. 435	Nash v. Hunt, 145 Mass. 397
Miss and Me. R. R. Co. v. Ward, 2 Black. 435	Nash v. Monheimer, 30 Ill. 215
Mitchell v. Reynolds, 1 P. Wms. 151	National Bank v. Commonwealth, 9 Wall. 353
Mitchell v. U. S. 21 Wall. 300	Neale v. Neale, 9 Wall. 1
Mitchell v. Winslow, 3 Story, 400	Neale v. Pullen, 45 Ga. 73
Mizer v. Howarth, 21 Pick. 235	Needer v. Larna, 10 Wis. 200
Mizer v. Shibley, 60 Ill. 61	Needham v. Ide, 5 Pick. 510
Mogg v. Baker, 3 M. & W. 136	Neison v. Haynton, 4 Mete. 336
Monseaux v. Urquhart, 10 La. Ann. 432	Nepht v. Wallace, 7 T. R. 17
Moody v. Wright, 13 Mete. 17	Neustadt v. Hall, 11 175
Moore v. Hudson River Railroad Co., 13 Barb. 108	New Albany v. Burke, 11 Wall. 90
Moore v. The Metropolitan Nat. Bk., 20 N. Y. 41	Newell v. Gregg, 51 Barb. 320
Moore v. Vail, 11 Ill. 185	Nerlin, Tap v. Davis, 30 P. F. Smith, 317
Moore v. Wilson, 1 T. R. 400	Newman v. McGrew, 5 Ohio, 340
Morrell v. Coddling, 4 Allen, 403	Newman v. Zachary, Aleys. 8
Morford v. Davis, 20 N. Y. 401	Newsome v. Collins, 43 Ind. 400
Morgan v. Bank of N. A., 9 Bery & B. 73	Newton v. Brunson, 15 N. Y. 307
Morgan v. Palmer, 2 H. & C. 720	New York & N. H. Railroad Co. v. Ketcham, 27 Conn. 170
Morgan v. Reynolds, 1 Mont. 162	New York & H. R. & Co. v. Marsh, 12 N. Y. 308
Morgan v. Schermerhorn, 1 Paige 345	New York & N. H. R. R. Co. v. Schuyler, 24 N. Y. 73
Merrill v. Niles, 3 Am. L. Rep. 21	Noble & Bro. v. Oulom & Co., 44 Ala. 418
Morris Hun Coal Co. v. Barclay Coal Co., 24 Penn. 172	Noonan v. Lacey, 21 Wis. 120
Morris v. Blithen, 19 Mo. 345	Noonan v. Lee, 3 Black. 557
Morris v. Floyd, 5 Barb. 130	Northwestern Distillery Co. v. Brant, 60 Ill. 400, 18 Am. Rep. 401
Morrison v. Keeler, 13 La. Ann. 543	Norton v. Marden, 15 Mo. 45
Morris v. Langdale, 1 H. & P. 204	Noyes v. Wood, 10 Conn. 220
Morris v. O'Brien, 10 Harris 441	Nichols v. Pearson, 7 Pet. 102
Morrison v. Rogers, 2 Sam. 317	Nloodamus v. East Saginaw, 25 Mich. 405
Morris v. Scott, 21 Wend. 241	Ogden v. Prentiss, 24 Barb. 180
Mott v. Mott, 11 Barb. 127	Ogden v. Saunders, 12 Wheel. 215
Monlin v. Insurance Co., 4 Zabr. 222	O'Hanlon v. Myers, 10 Rich. L. 113
Mountstapen v. Brooks, 3 Barn. & Ald. 141	O'Hara v. Jones, 45 Ill. 200
Morse v. Child, 6 N. H. 521	Oakley v. Oakley, 21 Ala. 131
Morse v. Gould, 1 Kern. 201	O'Connor v. Wilson, 53 Ill. 235
Morse v. Hurey, 9 Paige. 197	Odiorne v. Howard, 10 N. H. 843
Morse v. Insurance Company, 20 Wm. 400	Ohio Life and Trust Comp. v. Debolt, 15 How. 435
Morse v. Richmond, 41 Vt. 435	Oldham v. Broome, 1411 41
Morton v. Ingram, 11 Fed. 203	Oliver v. Townes, 14 Martin (La.), 60
Morton v. Tibbets, 15 Ad. & M. 420	Oliver v. Worcester, 120 Mass. 435
Mory, Ex'x of Michael, v. Michael, 10 Md. 201	Omyahund v. Barker, 1 Ark. 10
Moss v. Tutbill, 45 Ala. 301	Ord v. Noel, 5 Mad. 435
Moss v. P., F. W. & C. R. R. Co., 11 Ill. 510	O'Rear v. Strong, 15 Ill. 400
Moss v. Livingston, 4 N. Y. 103	Orndorf v. Hammar, 19 S. Moor. (Ky.), 419
Moss v. Livingston, 4 Conn. 205	Orr v. Baker, 4 Ind. 60
Mowatt v. Wright, 1 Wood. 305	Orr v. Lacy, 3 Doug. 280
Mower v. Lancaster, 6 Mass. 347	Owen v. Robbins, 19 Ill. 545
Mucklow v. Mangies, 1 Trust. 310	Page v. Rockport, 16 Am. Rep. 220; 2 C., 64 Mo. 51
Munn et al. v. Burch et al., 25 Ill. 50	Paige v. Cagnin, 7 Hill. 361
Munford v. Whitney, 25 Wend. 380	Paine's Lessee v. Mooreland, 15 How. 435
	Palmer v. Haskins, 25 Barb. 50

	PAGE.		PAGE.
Palmer v. Yarrington, 1 Ohio St. 909...	309	Pierce v. Fuller, 8 Mass. 223	571
Pardoe v. Lindley, 21 Ill. 174	86	Pierce v. Nashua Fire Ins. Co., 10 N. H. 297, 8 C. 9 Am. Rep. 235	300
Park v. Bates, 11 Vt. 281	637	Pierce v. The Inhabitants of Cambridge, 2 Cosh. 611	190
Parke v. Smith, 4 Watts & L. 287	94	Pickering v. Pickering, 19 N. H. 389	496
Parker v. Barker, 2 Metc. 429	540	Pidcock v. Potter, 65 Penn. St. 343	449
Parker v. Boston & Maine Railroad, 3 Cosh. 107	400	Pike v. Bright 29 Ala. 332	293
Parker v. The Great Western Railroad Co., 1 M. & G. 368	514	Pillsbury v. Dugan's Adm'r., 3 Ohio, 117	345
Parker v. Schenck, 28 Barb. 20	623	Pippet v. Hearn, 5 Barn. & Ald. 634	540
Parkersburg Stock Cases, 20 Md. 98; 8 C. 17 Am. Rep. 540	84	Pitkin v. Pitkin, 7 Conn. 307	296
Parsons v. Bedford, 2 Pet. 439	607	Pitt v. Donovan, 1 M. & S. 670	254
Parsons v. Loucks, 45 N. Y. 17, 18	623	Pitt v. Pursard 4 M. & W. 578	608
Parsons v. Loyd, 2 Wels. 245	186	Pittsburgh v. Grier, 10 Harris, 54	780
Parsons v. Phipps, 4 Tex. 241	98	Plalsted v. Palmer, 61 Me. 578	561
Paseo Manufacturing Company, 3 Daly, 495	605	Planters Bank v. Sharp, 6 How. 301	290
Patrick v. Cowles, 45 N. H. 554	443	Platt v. Squire 12 Metc. 494	296
Patrick v. Johnson, 9 Levins, 464	185	Playter v. Cunningham, 21 Cal. 239	607
Pattan v. Tallman, 27 Me. 17	413	Plumery v. Smith 5 N. H. 553	120
Patterson v. Commonwealth, 11 Bush, 311; 21 Am. Rep. 250	60, 67	Poole v. Lewis, 41 Ga. 162	526, 528
Paul v. City of Detroit, 28 Mich. 104	513	Poole v. Richardson, 8 Mass. 230	446
Paul v. Virginia, 6 Wall. 159	701	Pontiac v. Carter, 42 Mich. 164	530
Payne v. Barnham, 4 N. Y. Sup. 673	292	Porter v. Barclay, Wood & Oliver, 18 Ohio St. 548	371
Pearson v. Chapin, 44 Penn. St. 9	241	Porter v. Critchfield, 3 Ohio, 518	545
Pearson v. Kingsland, 3 Edwd. 196	291	Porter v. Haskell, 11 Me. 177	544
Pearson v. Jameson, 1 McLean, 196	145	Porter v. Havens, 5 Barb. 343	186
Pedro v. Barrett, 1 Ld. Raym. 51	637	Porter v. Wood & Oliver, 18 Ohio St. 548	372
Peck v. Jannone, 7 How. 8. C. 613	344	Post v. Bank of Utica, 7 Hill, 391	290
Peckham v. Potter, 1 C. & P. 228	94	Post v. Dart, 3 Paige, 429	290
Pecker v. Sawyer, 24 Vt. 459	93	Potter v. Railway Co., 21 Wis. 272	715
Peed v. McKee, 45 Iowa, 602; 20 Am. St. 121	121	Powell v. Hunt, 11 Iowa, 430	299
Pendleton County v. Amy, 13 Wall. 297, 304	291, 298	Pratt v. Adams, 7 Paige, 515	301
Penn v. Tallison, 28 Ark. 546	200	Presbyterian, etc., v. Williams, 9 Wend. 147	606
Pennock et al. v. Coe, 20 How. 117	654	Prescott v. State, 19 Ohio St. 184	709
Pennsylvania: R. v. Barnett, 20 Penn. St. 269	622	Preston v. Boston, 12 Pick. 7	612
Pennypacker v. Umberger, 23 Penn. 409	94	Preston v. Grand Collier Dock Co., 11 Simons, 227	207
Penrose v. Erie Canal Co., 54 Penn. St. 46	494	Preston v. Tubbin, 1 Vern. 290	371
Penta v. Stanton, 10 Wend. 271	179	Price v. Green, 16 M. & W. 848	505
Peplin v. Lachenmeyer, 45 N. Y. 27	201	Price v. Neale 3 Burr. 1354	106
People v. Clough, 17 Wend. 351	720	Pritchett v. Ins. Co. of North America, 3 Yeates 458	748
People v. Cunningham, 1 Den. 584	622	Prize Cases, 2 Black. 8. C. 1	299
People v. Hartwood, 14 N. Y. 489	457	Proctor v. Webber, 1 D. Chip. 371	299
People's Ferry Co. v. Heers, 20 How. 204	290	Proprietors of Locks and Canals v. The Nashua and Lowell Railroad Co., 10 Cosh. 283	212, 216
People v. Garner, 47 Ill. 546	142	Providence Bank v. Billings, 4 Pet. 503	17, 19
People v. Governors, 18 How. Pr. 408	708	Providence, etc., R. R. Co. v. Yonkers Ins. Co., 10 N. H. 74	254
People v. Peck, 3 Scam. 118	137	Pruden v. Pruden, 14 Ohio St. 264	290
People v. Supervisors Green County, 12 Barb. 217	212	Quackenbush v. Danks, 1 Den. 126	604
People v. Turner, 55 Ill. 290	709	R. R. Co. v. Hunter, 11 Wis. 160	717
People v. Warfield, 20 Ill. 159	162	Railroad Company v. Peniston, 18 Wall. 6	420
People v. Wiant 48 Ill. 262	162	R. R. Co. v. Pennsylvania, 15 Wall. 200	29
Peralta v. Oastro, 6 Cal. 354	412	Railroad Co. v. Trimble, 10 Wall. 367	246
Persine v. Striker, 7 Paige, 508	293	Rand v. Hale, 3 W. Va. 495	179
Perit v. Pittfield, 5 Rawle, 103	738	Randolph v. Meeks, Mart & Y. 58	657
Perkins v. Perkins, 30 N. H. 109	443	Ransay v. Spring, 21 Me. 110	524
Perkins v. Rodgers, 35 Ind. 124	546	Ransom v. Hays, 30 Mo. 445	299
Perry v. Chandler 2 Cosh. 237	608	Ratchife v. Davis, Yelv. 179	612
Perry v. Worcester, 6 Gray 544	500	Rawlinson v. Clarke, 14 Mees. & W. 147	506
Pitch v. Tulin, 15 M. & W. 110	619	Rawls v. Deahler, 4 Abb. Ct. App. 12	610
Peter v. Beverly, 10 Peters, 48	290	Rawls v. State, 11 N. & M. 587	518
Peters v. Brown, 4 Cap. N. P. 65	261	Rea v. Minkier 5 Laus. 148	607
Peterson v. Miss Valley Ins. Co., 24 Iowa, 484	202	Reading v. Commonwealth, 1 Jones, 196	747
Petts v. Gain, 3 Harris, 222	751	Real Estate Co. v. Sengrave, 49 How. Pr. 478	299
Phelps v. Sawyer, 1 Ark. (Vt.) 154	607	Redway v. Gray, 11 Vt. 258	296
Phil and R. R. Co. v. Hummell, 44 Penn. St. 275	114, 116	Reed v. Drake, 29 Mich. 222	528
Philbrook v. Beisap, 6 Vt. 3	261	Reg v. Daly, 9 C. & P. 342	122
Phillips v. Boone, 18 Ala. 123	290		
Phillips v. Stickney, 2 Metc. 264	10		
Phipps v. Pitcher, Taunt. 220	400		
Pierce v. Boston, 2 Metc. 220	404		

TABLE OF CASES CITED.

XXV

	PAGE.		PAGE.
<i>Reg. v. Panning</i> , 37 Irish C. L. 200.	200	<i>Ryan v. Doxy</i> , 34 N. Y. 307.	370
<i>Reg. v. Mills</i> , 10 Cl. & F. 600.	600	<i>Ryerson v. Abington</i> , 100 Mass. 500.	710
<i>Reg. v. Stone</i> , 4 C. & P. 373; 2 How. P. C. 60.	130	<i>Ryder v. Flanders</i> , 20 Mich. 300.	334
<i>Regina v. Brown</i> , 1 C. & K. 144.	200	<i>Sabine v. Vermont Central Railroad Co.</i> , 35 Vt. 351.	213, 234
<i>Regina v. Trillo</i> , 1 Car. & M. 000.	201	<i>Sainter v. Ferguson</i> , 7 C. B. 714.	304
<i>Reichard v. Warren Co.</i> , 31 Iowa, 301.	216, 222	<i>Salem Bk. v. Gloucester Bk.</i> , 17 Mass. 1.	611
<i>Rein v. Nanton</i> , 33 Tex. 760.	443	<i>Salem v. Ropes</i> , 3 P. & S.	768
<i>Reiser v. Clarkson</i> , 1 Venable, 44.	747	<i>Saltmarsh v. Tuttle</i> , 1 How. 229.	94
<i>Rouse v. Pickens</i> , L. R. 1 Exch. 340.	340	<i>Salters v. Howard</i> , 43 Ga. 601.	436
<i>Rex v. D. I. M. & C. P. 20.</i>	670	<i>Salters v. Salters</i> , 6 Bush 974.	373
<i>Rex v. Knapp</i> , 3 C. & P. 320.	201	<i>Sanders v. Howes</i> , 4 Burr. 304.	701
<i>Rex v. Penning</i> , 3 C. & P. 615.	202	<i>Sanders v. Hamilton</i> , 3 Dana, 553.	343
<i>Rex v. Stratton</i> , 1 Camp. 349.	730	<i>Sargis v. Blackman</i> , 4 C. & P. 297.	401
<i>Reynolds v. Corp. & Douglas</i> , 2 Calnes, 31.	130	<i>Sargent v. Morris</i> , 3 B. & A. 274.	676
<i>Reynolds v. Stevenson</i> , 4 Ind. 619.	130	<i>Satterwhite v. Littlefield</i> , 1 B. & M. 301.	303
<i>Reynolds v. Wilson</i> , 13 Ill. 304.	140	<i>Sewage v. H. & Co.</i> , 9 N. H. 201.	170
<i>Rhines v. Phelps</i> , 4 Ill. 425.	600	<i>Sawyer v. Baker</i> , 1 Mo. 29.	604
<i>Rice v. Walling</i> , 5 Wend. 305.	600	<i>Sawyer v. Hoag</i> , 17 Wall. 63.	100
<i>Rich v. Flanders</i> , 20 N. H. 104.	400	<i>Sayce v. Smith</i> , 12 Wend. 5.	300
<i>Richardson v. Cooper</i> , 3 M. 420.	370	<i>Searle v. Morgan</i> , 4 M. & W. 240.	613
<i>Richardson v. H. & Co.</i> , 3 Madd. 100.	205	<i>Schenectady Plank Road Co. v. Thatch-</i> <i>er</i> , 11 N. Y. 107.	614
<i>Richardson v. Milburn</i> , 17 Ind. 67.	400	<i>Schuyler v. Allegany</i> , 1 Wright 5.	701
<i>Richardson v. Richardson</i> , 35 Vt. 300.	411	<i>Schermerhorn v. Tallman</i> , 11 N. Y. 43.	300
<i>Rickett v. Ryder</i> , 9 Wend. 416.	600	<i>Schofield v. Kechelberger</i> , 7 P. 1. 304.	300
<i>Riddle v. Propa</i> , etc., 7 Mass. 60.	214, 400	<i>School District No. 8 v. Arnold</i> , 21 Wis. 657.	371
<i>Ridley v. Perry</i> , 4 Shop. 31.	300	<i>Schooner Freeman v. Buckingham</i> , 13 How. 191.	31
<i>Ridgshopf v. F. L. & T. Co.</i> , 55 Barb.	607	<i>Seaboard v. Eighth St. Dist.</i> , 27 Conn. 409.	371
<i>Ringo v. Brooks</i> , 26 Ark. 540.	200	<i>Scott v. Hunter</i> , 11 W. 111.	707
<i>Ringold v. Tyson</i> , 3 Harris & J. 173.	60	<i>Scott v. Jones</i> , 5 How. 8. 2. 343.	307
<i>Ritter v. Hamilton</i> , 4 Texas, 300.	300	<i>Scott v. Lloyd</i> , 12 Pet. 115.	94
<i>Rix, assignee, v. Capital Bank</i> , 3 Dill. 377.	374	<i>Scott v. Pinking</i> , 13 B. & S. & Smith 11.	341
<i>Robbins v. Walters</i> , 3 Tex. 130.	200	<i>Scott v. Sims</i> , 1 S. & L. 401.	637
<i>Robert v. Button</i> , 14 Vt. 185.	100	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robert v. Carter</i> , 34 N. Y. 107.	370	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robert v. Fisher</i> , 43 N. Y. 150.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robert v. Chicago</i> , 25 Ill. 249.	510	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robert v. Mason</i> , 10 Ohio St. 377.	304	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robertson v. McNeil</i> , 12 Wend. 578.	604	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robertson v. Shores</i> , 7 Coldw. 164.	604	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robertson v. Stark</i> , 15 N. H. 114.	400	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robertson v. Vane</i> , 5 Sandf. & G. 1.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robinson v. Pife</i> , 3 D. 1 St. 451.	377	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robinson v. Justice</i> , 2 Penn. 441.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robinson v. Keyser</i> , 22 N. H. 237.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robinson v. McJannet</i> , 5 M. & M. 200.	604	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robinson v. Noble</i> , 8 Peters. 181.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Robinson v. Pittsburgh and Connell-</i> <i>sburg Railroad Co.</i> , 32 Penn. St. 304.	307	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Roly v. West</i> , 4 N. H. 205.	497	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rorchester White Lead Co. v. Rochester</i> , 3 N. Y. 405.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rockwell v. Hubbell's Adm'rs</i> , 3 D.	607	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rockwood v. Watson</i> , 11 Comb. 21.	400	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Roe v. Jerome</i> , 184.	94	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rogers v. Greenbush</i> , 4 Am. Rep. 202.	413	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rhode v. Thwaites</i> , 1 B. & C. 200.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rohrer v. Morning Star</i> , 15 Ohio, 370.	94	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Romero v. Hale</i> , 1 Gray, 24.	200	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rosevelt v. Brown</i> , 1 Kern. 100.	40	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rose v. Clark</i> , 3 Paige 411.	574, 575	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rose v. Himely</i> , 4 Cranch 301.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rose v. Jones</i> , 21 Wall. 576.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Roth v. House of Refuge</i> , 1 Mo. 300.	700	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rowan v. Leates</i> , 21 Wall. 19.	700	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rowan v. Sharp Co.</i> , 21 Conn. 130.	607	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rowan v. Sharp's Ride Manf. Co.</i> , 20 Conn. 302.	600	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rowe v. Portsmouth</i> , 4 Mich. 444.	430	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Ruse v. Mutual Life Ins. Co.</i> , 20 N. Y. 600.	200	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Russell v. Ormiston</i> , 10 Vt. 374.	741	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Russ v. Steele</i> , 40 Vt. 300.	607	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304
<i>Rutherford v. Morris</i> , 11 Ill. 307.	404	<i>Se v. Tuttle</i> , B. & C. 210 Ohio St. 504.	304

	PAGE.		PAGE.
Silver Lake Bank v Harding, 5 Ohio,	644	State v Barry, 14 Ohio St. 315	670
Smith v Rogers, 15 Ill. 397	645	State v Burlington, 15 Coldw. 104	669
Smith v. Candidate for 4th Dist.	610	State ex rel v Ch. Gas-light & Coke	670
Smith v. Jackson, 11 W. 345	100	Co 12 Ohio St 323	670
Smith v. Jackson, 11 W. 345	100	State v County Court, 51 Ill. 220; 8 C.	670
Smith v. Jackson, 11 W. 345	100	11 Am Rep 454	670
Smith v. Jackson, 11 W. 345	100	State v County Judge, Marshall County	670
Smith v. Jackson, 11 W. 345	100	Iowa, 100	670
Smith v. Jackson, 11 W. 345	100	State v Doherty, 60 Mo. 323	660
Smith v. Jackson, 11 W. 345	100	State v Drake, 25 Mo 225	650
Smith v. Jackson, 11 W. 345	100	State v Green 7 Wis 378	671
Smith v. Jackson, 11 W. 345	100	State v Hummel, 60 Mo 410	651
Smith v. Jackson, 11 W. 345	100	State v Knapp, 40 N. H. 122	660
Smith v. Jackson, 11 W. 345	100	State Bank of Ohio v Knapp, 10 How.	660
Smith v. Jackson, 11 W. 345	100	225	660
Smith v. Jackson, 11 W. 345	100	State v Peck, 15 Ohio St 20	660
Smith v. Jackson, 11 W. 345	100	State v Pike, 45 N. H. 225, 226	647
Smith v. Jackson, 11 W. 345	100	State v Lightbody, 25 Mo 100	650
Smith v. Jackson, 11 W. 345	100	State v McMurray, 3 Struth 20	650
Smith v. Jackson, 11 W. 345	100	State v McLeven, 1 Allen, 211	650
Smith v. Jackson, 11 W. 345	100	State v Middleton, 5 Port. 491	650
Smith v. Jackson, 11 W. 345	100	State v Norton, 5 Zabr 23	650
Smith v. Jackson, 11 W. 345	100	State v Pike, 45 N. H. 225, 421-422, 441	646
Smith v. Jackson, 11 W. 345	100	State v Rom 4 Zabr 497	191
Smith v. Jackson, 11 W. 345	100	State v Smith, 31 Iowa, 225	650
Smith v. Jackson, 11 W. 345	100	State v Symonds, 25 Mo 127	654
Smith v. Jackson, 11 W. 345	100	State v Ward, 42 Mo 225	654
Smith v. Jackson, 11 W. 345	100	State v Weaver, 13 Ind 103	657
Smith v. Jackson, 11 W. 345	100	State v Williams, 5 Port. 120	650
Smith v. Jackson, 11 W. 345	100	State v Wiles, 45 N. C. 120	650
Smith v. Jackson, 11 W. 345	100	Steedman v Fiedler, 20 N. Y. 497	670
Smith v. Jackson, 11 W. 345	100	Steamboat Josephine, 20 N. Y. 19	671
Smith v. Jackson, 11 W. 345	100	Steamboat Orleans v. Phoebus, 15 Pet-	671
Smith v. Jackson, 11 W. 345	100	ers, 173	671
Smith v. Jackson, 11 W. 345	100	Steamer St Lawrence, 1 Black, 222	670
Smith v. Jackson, 11 W. 345	100	Stearns v Barret, 1 Pluck 445	670
Smith v. Jackson, 11 W. 345	100	Stearns v Dillingham, 2 Vt. 397	671
Smith v. Jackson, 11 W. 345	100	Steel v McDowell, 2 S. & M. 100	670
Smith v. Jackson, 11 W. 345	100	Stevens v. Donnett, 21 N. H. 224	671
Smith v. Jackson, 11 W. 345	100	Stevens v McNamara, 57 Mo. 170	670
Smith v. Jackson, 11 W. 345	100	Stevens v The Mechanics' Savings	670
Smith v. Jackson, 11 W. 345	100	Bank, 101 Mass 100, 5 C. 8 Am. Rep.	670
Smith v. Jackson, 11 W. 345	100	225	670
Smith v. Jackson, 11 W. 345	100	Stevens v Tuite, 101 Mass 225, 226	670
Smith v. Jackson, 11 W. 345	100	Stevenson v. Williams, 15 Wall, 570	670
Smith v. Jackson, 11 W. 345	100	Stewart v. Christon, 31 Mich 270	670
Smith v. Jackson, 11 W. 345	100	Stewart v. Anderson 8 Cranch, 213	670
Smith v. Jackson, 11 W. 345	100	Stiles v Davis, 1 Black (C 5), 101	670
Smith v. Jackson, 11 W. 345	100	Stirling v. Garrigue, 16 Md. 400	670
Smith v. Jackson, 11 W. 345	100	Stinson v Reynolds 97 Penn St 64	670
Smith v. Jackson, 11 W. 345	100	Stobart v Dryden, 1 N. & W 415	670
Smith v. Jackson, 11 W. 345	100	Stocking v Hunt, 3 Denio 274	670
Smith v. Jackson, 11 W. 345	100	Stoken v McAllister 2 Mo 102	670
Smith v. Jackson, 11 W. 345	100	Stokes v. Scott Co., 10 Iowa, 170	670
Smith v. Jackson, 11 W. 345	100	Stone v Browing, 31 N. Y. 211	670
Smith v. Jackson, 11 W. 345	100	Stowe v Parker 6 Johns Ch 100	670
Smith v. Jackson, 11 W. 345	100	Strang v Wilcox 1 Morris, 54	670
Smith v. Jackson, 11 W. 345	100	Strawn v Strawn, 45 Ill 205	670
Smith v. Jackson, 11 W. 345	100	Street v Bush 15 Cal 67	670
Smith v. Jackson, 11 W. 345	100	Strother v Low, 45 Ill 415	670
Smith v. Jackson, 11 W. 345	100	Stroud v. Philadelphia, 11 P. P. Smith,	670
Smith v. Jackson, 11 W. 345	100	225	670
Smith v. Jackson, 11 W. 345	100	Stuart, Assignee, v. Hines, 23 Iowa, 60	670
Smith v. Jackson, 11 W. 345	100	Stuart v Simpson, 1 Wood 310	670
Smith v. Jackson, 11 W. 345	100	Stuart v Taylor 1 How Pr 351	670
Smith v. Jackson, 11 W. 345	100	Stuart v The People, 3 Boam 225	670
Smith v. Jackson, 11 W. 345	100	Sturdivant v Hall, 60 Mo 172, 5 Am.	670
Smith v. Jackson, 11 W. 345	100	Rep 422	670
Smith v. Jackson, 11 W. 345	100	Sturdivant v Hall, 40 Mo. 172	670
Smith v. Jackson, 11 W. 345	100	Sturges v Alth, 10 Wend 225	670
Smith v. Jackson, 11 W. 345	100	Sturges v Crowninshield, 4 Wheat. 122	670
Smith v. Jackson, 11 W. 345	100	Sumner v. Williams, 3 Mass. 100	670
Smith v. Jackson, 11 W. 345	100	Swaine's Machine Co. v Partridge, 20	670
Smith v. Jackson, 11 W. 345	100	N. H. 274	670
Smith v. Jackson, 11 W. 345	100	Swain v Bussell, 10 Ind 430	670
Smith v. Jackson, 11 W. 345	100	Swan v Chaudler, 5 B. Mour 97	670
Smith v. Jackson, 11 W. 345	100	Swan v Rary, 3 Blackf 225	670
Smith v. Jackson, 11 W. 345	100	Swan v Mitchell, 15 Wis 215	670
Smith v. Jackson, 11 W. 345	100	Sweeney v. Old Colony and Newport Ry.	670
Smith v. Jackson, 11 W. 345	100	Co., 15 Allen, 273	670
Smith v. Jackson, 11 W. 345	100		670

TABLE OF CASES CITED.

xviii

	PAGE.		PAGE.
Swift v. Dean, 11 Vt. 338.....	338	Thomas v. Williams, 30 R. & C. 284 ..	281
Swift v. Williamsburgh, 34 Barb. 427 ..	218	Thompson v. Alexander, 11 Ill. 34 ..	170
Swick v. Sears, 1 Hill, 17	534, 540	Thompson v. Alger, 12 Mete. 428 ..	570
Tarlton v. McGawley, Pease, 335.....	408	Thompson v. Davies, 13 Johns. 112 ..	10
Tarpley v. Horner, 17 Miss. 210	694	Thompson v. Doulny 14 Mees & Wels. 478 ..	30
Tappan v. Merchants' Bank of Ohio- go, 19 Wall. 480	34	Thompson v. Mainin, 35 Ark. 28 ..	280
Tate v. The Mutual Fire Insurance Co., 13 Gray, 79	305, 306	Thompson v. Shirley, 1 Rep. 31 ..	282
Tatham v. Wright, 3 Russ. & Mylne, 1	448	Thompson v. Van Vechten, 27 N. Y. 529 ..	291
Taylor v. Aitchison, 54 Ill. 196; S. C., 4 Am. Rep. 119	84	Thompson v. Wheatley, 8 S. & M. 490 ..	548
Taylor v. Beck, 3 Rand. 318	30	Thomson v. Whitman, 18 Wall. 457 ..	196
Taylor v. Board of Health, 31 Penn. 78 ..	513	Thomson v. Pariser & Co., 9 Wall. 579 ..	421
Taylor v. Dist. Tp. of Wayne, 26 Iowa, 447	218	Thomson v. Saylor, 11 N. H. 301 ..	304
Taylor v. Grand Trunk Railway, 45 N. H. 304	440	Thompson v. Woodbridge, 8 Mass. 284 ..	527
Taylor v. Grant, 3 Jones & S. 288	203	Thorne v. Tilbury, 3 H. & N. 54 ..	618
Taylor v. Hendrie, 8 Nev. 248	200	Thornon v. Kemper, 5 Taunt. 798 ..	600
Taylor v. Hopkins, 40 Ill. 428	144	Thorington v. Smith, 8 Wall. 1	305
Taylor v. Luther, 2 Sumn. 335	84	Thorpe v. Rutland & Burlington R. R., 27 Vt. 140	79
Taylor v. Taylor, 1 Rich. (S. C.) 531 ..	415	Threl v. Meade & Estate, 40 Vt. 540 ..	200
Taylor v. Thomas, 28 Wall. 479	344	Thurston v. Kennett, 22 N. H. 151 ..	444
Tedford v. Wilson, 3 Head, 311	654	Thurston v. Mauro, 1 Greene, 231 ..	179
Tompert v. Chambers, 1 Starkie, 55 ..	662	Thurston v. St. Joseph, 51 Mo. 510 ..	510
Terrett v. Taylor, 3 Oranch, 48	974	Tibbets v. Shaw, 19 Mo. 304	623
Terry v. Ferguson's Adm'r, 5 Porter (Ala.), 500	606	Tilgham v. Preston 7 J. R. 265	644
Texas v. White, 7 Wall. 700	644	Tilton v. Kingston Mutual Ins. Co. 7 Barb. 570, 8 N. Y. 405	206
Thayer v. Crossman, 1 Mete. 416	94	Tilton v. Nelson, 27 Barb. 505	540
The Bank of Rochester v. Jones, 4 N. Y. 467	620	Titus et al. v. Mabee et al., 25 Ill. 267 ..	606
The Bank of St. Albans v. The Farm- ers' Bank, 10 Vt. 141	110	Tingley v. Cowgill, 48 Mo. 291	442
The Belfast, 7 Wall. 684, 687	601	Todd v. Railroad Co., 7 Allen 307	718
The Bank of United States v. Dunn, 6 Pet. 51	92	Todd v. Stafford, 1 Atw. 199	98
The First National Bank of Lyons v. The Ocean National Bank, 60 N. Y. 278; S. C., 19 Am. Rep. 181	80	Tompson v. Whitman, 18 Wall. 457 ..	348
The General Smith, 4 Wheat. 400	300	Tompson v. Colter, Yale 112	620
The G. & C. V. R. R. Co. v. Loomis, 18 Ill. 548	73	Towers v. Osborne, 1 Strange, 508 ..	622
The Hine, 4 Wall. 555	300	Town of Ligonier v. Ackerman, 1 Am. Rep. 323	291
The Leather Cloth Co. v. The American Leather Cloth Co., 11 H. of L. Can. 380 ..	45	Townsend v. Bush, 1 Conn. 291	90
The Loon, 7 Blatchf. C. C. 244	22	Townsend v. Hargreaves, 114 Mass. 225 ..	372
The Lottawanna, 30 Wall. 219	300	Townsend v. Northwestern Ins. Co., 13 N. Y. 108	200
The Lottawanna, 31 Wall. 571	300	Treasurer of Champaign County v. Nor- ton 1 Ohio 270	345
The Mayor of New York v. Furze, 8 Hill, 615	467	Trenton Mutual Life Ins. Co. v. John- son, 4 Zab. 576	743
The Moses Taylor, 4 Wall. 411	300	Tren v. Brown, 14 Ohio 402	94
The N. Y. & Harlem R. R. v. Marsh, 19 N. Y. 308	516	Trimbe v. Boothby, 14 Ohio, 100 ..	372
The People v. Wilson, 64 Ill. 195; S. C., 18 Am. Rep. 285	181	Tripiett v. Allen, 21 Am. Rep. 330 ..	720
The Prize Queen, 3 Blackf. 688	316	Trombly v. Humphrey 25 Mich. 471; S. C. 9 Am. Rep. 34	709
The Queen v. Lefroy, L. R., 8 Q. B. 134, 4 Moak, 250	182	Troup v. Ward, 4 Johns Ch. 264	10
The Railroad v. Miles, 5 P. F. Smith, 308	749	Trusdell v. Ward, 24 Mich. 117	308
The Steamboat Gen. Buell v. Long, 18 Ohio St. 621	300	Truscott v. Davis, 4 Haro. 496	282
The Steam Nav. Co. v. Dendridge, 6 Q. & J. 512, 519	80	Tucker Mfg. Co. v. Fairbanks et al., 94 Mass. 101	179
The Steamer St. Lawrence, 1 Black. 587	400	Tucker v. Ferguson 22 Wall. 27	190
The Tonawanda R. R. Co. v. Munger, 5 Denio, 225	110	Tucker v. Jewett, 32 Conn. 581	243
The Town of Lake View v. Lets et al., 4 Ill. 21	74	Tucker v. Tucker 5 Fred. (N. C.) 82 ..	414
The Trustees of the Philadelphia Bap- tist Association v. Hart's Ex'rs, 4 Wheat. 1	124	Tuft v. Whitman 15 Ohio 123	200
Thomas v. Cook, 15 Reg. Com. Law, 338 ..	306	Tully v. Davis, 30 Ill. 103	180
Thomas v. Taylor, 45 Mass. 681	346	Turner v. Cassid, 1 Oh. 371	372
Thomas v. Telegraph Co. 100 Mass. 187 ..	300	Turner v. Goodrich 28 Vt. 207	606
		Turpin v. Bemy 2 Black, 211	344
		Tuthill v. Davis 20 Johns. 283	94
		Tyler v. Tyler 19 Ill. 151	107, 100
		Union Bank v. Bell 14 Ohio St. 300 ..	300
		Union Bank v. New York, 31 Barb. 159 ..	516
		Union Bank v. Ridgely 1 H. & G. 388 ..	41
		United States v. London & Peter, 604 ..	361
		United States v. Lige 2 Id. Baym. 1307	602
		United States v. Counts 12 Pet. 73 ..	607
		United States v. Insurance Companies, 22 Wall. 99	344
		United States v. Laffer 11 Pet. 96 ..	96
		United States v. New Orleans R. R. Co., 12 Wall. 302	604

TABLE OF CASES CITED.

xxix

	PAGE.		PAGE.
Willis v. Quimby, 31 N. H. 435.	457	Wood v. Vallette, 7 Ohio St. 173.	399
Wilson v. Alexander, 3 Scam. 393.	107	Woodward v. Murray, 18 Johna. 400.	153
Wilson v. Auderton, 1 B. & Ad. 400.	603	Harper v. Leal, 10 How. Pr. 376.	153
Wilson v. Bank of Mt. Pleasant, 6 Leigh, 570.	351	Woodward v. Seeley, 11 Ill. 157.	344
Wilson v. Cochran, 10 Wright, 239.	751	Woolen v. Banker, 5 Am. Law Rec., 236.	68
Wilson v. Fuller, 9 Kan. 175.	236	Workman v. Ins. Co., 3 La. O. S. 507.	253
Wilson v. Genesee Mutual Ins. Co., 16 Barb. 511.	205	Work v. Kase, 34 Penn. St. 128.	94
Wilson v. New York, 1 Denio, 595.	509	Works v. Junction R. R., 5 McLean, 425.	323
Wilson v. Whitehead, 10 M & W 503.	331	Worman v. Teagarden, 2 Ohio St. 303.	309
Winchell v. Edwards, 57 Ill. 41.	533	Worrall v. Judson, 5 Barb. 210.	50
Wing v. Terry, 5 Hill, 160.	304	Worsley v. Earl of Scarborough, 3 Atkyns, 392.	371
Winnie v. Cole, 1 Mies. 119.	535	Wray v. Pittsburgh, 10 Wright, 366.	761
Winmore v. Greenbank, Willes, 577.	456	Wright v. DeGross, 14 Mich. 184.	549
Winslow v. McCall, 33 Barb. 341.	657	Wright v. Wright, 1 Litt. 179.	125
Winsor v. McLellan, 2 Story, 482.	697	Wyatt v. Bailey, 1 Morris, 396.	333
Winter v. Coit, 7 N. Y. 233.	615	Wyatt v. Watkins, 18 Alb. Law Jour., 305.	653
Witherell v. Randall, 30 Ms. 133.	554	Wyman v. St. Louis, 17 Mo. 305.	191
Withers v. Powers, 2 Sandford Ch. 350.	660	Wyman v. Symmes, 10 Allen, 153.	413
Witty v. Hightower, 12 Ala. 473.	637		
Woodcock v. Bennet, 1 Cow. 711.	157	Young v. Adams, 6 Mass. 133.	530
Woodruff v. Parham, 8 Wall. 130.	68	Young v. New Haven, Conn. 435.	533
Wood v. The Hartford Fire Ins. Co., 13 Conn. 544.	340	Young v. Ward, 31 Ill. 233.	34
Wood v. Leadbitter, 13 M. & W. 339.	644	Zettman v. San Francisco, 20 Cal. 96.	213
Wood v. Rutland & Addison Mutual Ins. Co., 31 Vt. 522.	205		204
		Zelgler v. Gray, 13 I & R. 42.	94

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

CHARLESTON V. PEOPLE'S NATIONAL BANK.

(5 S. C. 103.)

National bank — increase of capital stock — taxation of increased stock.

Where a national bank voted to increase its capital stock, and the requisite number of new shares were subscribed and paid for before the 1st January, 1872, and a semi-annual dividend, declared as of that day, was paid upon the new shares, as well as the old, but such increase of capital was not approved by the comptroller of the currency, nor his certificate issued until the 5th January, 1872: *Held*, that such new shares were not the subjects of taxation under an ordinance imposing a tax on bank shares "in the hands of the tax payers on the 1st January, 1872."

There can be no increase of the capital of a national bank until the comptroller of the currency approves thereof and issues his certificate, as provided by section 18 of the Act of Congress providing for the organization of national banks.

CASE agreed upon in a controversy submitted without action.

The city council of Charleston claims to recover of the stockholders of the People's National Bank \$6,312.50.

The following are the facts upon which said controversy depends:

1. That the city council of Charleston is a municipal corporation under the laws of the State of South Carolina, "with power and authority to make such assessments on the inhabitants of Charles-

Charleston v. People's National Bank.

ton, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, as shall appear to them expedient."

2. That an ordinance to raise supplies for the year 1872, ratified on the day of , 1872, by said city council imposed a tax of two per cent upon the taxable property within said city. in the hands of tax payers, on 1st January, 1872.

3. That the People's National Bank, a banking association within the limits of the city of Charleston, organized under the laws of the United States, on the 12th day of February, 1872, returned seven thousand five hundred shares, valued at one hundred dollars each, as in the hands of its stockholders, subject to taxation, upon which, after deducting value of real estate and city stock, at \$23,440, a tax of two per cent was duly assessed by the city appraiser, and the same has been duly paid by said bank for its stockholders, pursuant to section 28 of ordinance of February 10, 1870.

4. That, on the 1st day of July, A. D. 1871, said banking association voted to increase the number of shares of capital stock in said bank to one thousand, subject to the approval of the controller of currency. Between 1st July, 1871, and 1st January, 1872, said two thousand five hundred additional shares were duly subscribed, and the amount thereof, two hundred and fifty thousand dollars, was secured to be paid to said banking association, and the securities were held by the cashier in trust for it. The said banking association declared and paid a semi-annual dividend upon all of its said stock, including said increase of two thousand five hundred shares, on the 7th day of January, A. D. 1872, for the half year ending January 1, 1872.

5. That the subscribers to said additional shares of stock did receive certificates of stock representing the same after the 2d January, 1872.

6. That on the 15th day of June, A. D. 1872, said banking association having failed to return said additional shares for taxation to the city council, the city appraiser, pursuant to sections 29 and 38 of the ordinance of the city, of February 10th, 1872, proceeded to list said two thousand five hundred shares of stock for taxation, and fixed the value thereof at one hundred dollars per share, amounting in all to two hundred and fifty thousand dollars, and levied pursuant to ordinance of city council, of the day of , A. D. 1872, a tax of two per cent thereon, which tax amounted to

(*Charleston v. People's National Bank.*)

the sum of five thousand dollars, which, not having been paid at the times required by ordinance, is subject to a penalty of twenty per cent for non-payment, pursuant to section 48 of the ordinance of February 10th, 1872, amounting to one thousand dollars. There has been a school tax assessed by the Charleston city board of school commissioners, of three hundred and twelve dollars and fifty cents (\$312.50), to be collected by the city council of Charleston, and if said stock is taxable the same is now due to plaintiff.

7. The said banking association did not obtain leave of the United States comptroller of currency to increase its capital stock till after the 1st day of January, 1872; and the comptroller of currency refused to recognize any increase of the capital stock of the bank until the 5th day of January, 1872; and, the 3d day of January, 1872, said banking association returned to the comptroller of currency, at Washington, only seven thousand five hundred shares as the amount of its capital stock, subject to taxation by the general government, paid the tax thereon, and the said return and payment were accepted by the said comptroller.

The question submitted to the court is: Had the city council a right to levy the tax on the two thousand five hundred shares of stock, under the facts stated?

The court below ordered, that judgment be entered against the defendant in the sum of six thousand three hundred and twelve dollars and fifty cents, with costs, and that the plaintiff have execution thereof.

The defendant appealed.

Simonton, for appellant.

Minot, city attorney, *Corbin & Stone*, for respondent.

MOSES, C. J. The single question presented by the case agreed upon in a controversy submitted without action between these parties is, whether the city council of Charleston had a right to levy the tax on the twenty-five hundred shares of the stock referred to in the brief.

It is not necessary to repeat the facts on which our judgment is to be pronounced, for they are recited in the agreement which precedes this opinion.

The ordinance of the city council imposed the tax "on the shares in the hands of its shareholders, respectively" (§ 22, p. 96,

Charleston v. People's National Bank.

city ordinances, 1859-70), and if the shares upon which it is claimed the proposed tax is to operate can be comprehended within its terms, the judgment of the Circuit Court must be affirmed.

The institution in question was established and organized as one of the national banks, under the act of Congress of 3d June, 1864, "to provide a national currency secured," etc. (13 U. S. Statutes, 99). For its formation it was necessary that a certificate should be prepared and filed with the comptroller of the currency at Washington, which should contain, among other things, a specification of the amount of its capital stock, and the number of shares into which it was to be divided. This is the evidence of the amount of such capital stock and its distribution into shares, and these last are then fixed, designated and known at the bureau of currency by the record preserved in the proper office thereof. The act further provides by its 18th section, page 103, "for an increase of the capital from time to time, provided that the maximum of such increase shall be determined by the comptroller of the currency; and no increase shall be valid until the whole amount of such increase shall be paid in, and notice thereof transmitted to the comptroller, and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as a part of the capital of such association."

The argument, on the part of the respondent, proceeds upon the ground that the proposed increase of the capital by the said twenty-five hundred shares was effected by the subscription to that extent, and the acceptance of certain securities therefor, held by the cashier in trust for the association. If this is well founded, then the increase does not depend on a compliance with the conditions expressed in the act of Congress, but on arrangements with the shareholders, originally organized under it, may make with third persons, in the face of the very law to which they owe the existence of their association, and under which, it is to be assumed, they are at least to carry out the obligations which it imposes. The error is in the attempt to give force to these shares as valid and properly constituted shares of the association, before the approval of the comptroller, when, in point of fact, the increase of the capital depended upon it. The resolution on the 1st day of July, 1871, to increase the number of the shares, by its very terms, made it dependent on such approval. Until obtained, the capital remained as originally fixed. The act of the stockholders to that end was no more than

Charleston v. People's National Bank.

a proposition among themselves, the effect of which was subject to the assent of the higher authority designated by the act of Congress. A solution of the proposition may be tested by the inquiry, whether, if before the 7th January, 1872, any one of the so-called stockholders could have required the association to issue a certificate for the shares so agreed to be taken by him. Only one answer could be given to it, and that, it appears to us, would conclude the respondent from imposing the tax, which must be upon shares of the capital stock, which, before the 7th January, 1872, was limited to the amount originally allowed by the certificate of organization.

It is supposed that these additional shares are subject to the tax because the \$250,000 which they represented was actually paid before the 1st January, 1872, and a semi-annual dividend declared and paid on them for the half year then ending. The ordinance in question "imposed the tax on taxable property within the said city in the hands of tax payers on 1st January, 1872."

The proposed increase of the capital was required by the act of Congress to be paid in as a precedent condition, on the performance of which the approval of the comptroller depended. If he had withheld it, the very requisite which was necessary to make the money deposited the medium through which the certificates of the additional shares could of right be demanded, was wanting.

That the money thus subscribed remained in possession of the bank, and that those who had advanced it, received on 7th January, 1872, a dividend for the half year ending on the first day of the said month, in common with the original stockholders, cannot affect the question. The original stockholders could apply the profits of the bank at their own pleasure, and if those who were interested in restricting the application of the dividends to the original stock do not complain, their want of objection cannot convert what must be considered as mere proposals for stock into valid and legal shares. The tax is not on the dividend, but on the share. The view which the comptroller of the currency took of the liability of the said twenty-five hundred shares to the tax of the government is clear, from the fact that although the said banking association, on 3d January, 1872, returned to him, subject to taxation by the government, only seven thousand five hundred shares, he imposed no tax beyond them, and accepted the said return and payment as a compliance with the law.

While we are in no way bound by his decision, it cannot preju-

Dudley v. Odom.

dice our conclusion, that the public officer charged by Congress with the duty of estimating the capital of these associations, on which the United States tax was to be laid, on the same facts before him, with the knowledge of the further extension of the capital of this bank, did not exact any tax on the said twenty-five hundred shares.

The answer of the court is, that the city council of Charleston did not have the right to levy the tax on the twenty-five hundred shares under the facts stated.

The judgment of the Circuit Court is, therefore, reversed.

Judgment reversed.

DUDLEY V. ODOM.

(5 S. C. 181.)

Illegal contract — agreement not to bid at assignee's sale.

A contract between two creditors interested in a public sale about to be made by an assignee in bankruptcy, that one will not bid against the other, and in consideration thereof, that the latter will pay to the former a certain sum of money, is against public policy, and, therefore, null and void.

ACTION by Dudley against Odom to recover \$700 alleged to be due on contract.

The case was this : The plaintiff held a judgment by confession for \$2,112.98, entered 22d August, 1866, against John Odom, the father of defendant ; and J. H. Hudson also held an older judgment against John Odom, which amounted, at the time of the sale herein mentioned, to about \$1,500. In 1868, John Odom was adjudged a bankrupt on his own petition, and on November 1st of the same year his real estate, consisting of 600 acres of land of the value of \$10 per acre, was sold by his assignee and purchased by the defendant at the price of \$1,500. The plaintiff and defendant met at the time and place of the sale, and just before the property was offered by the assignee, it was agreed between them that the defendant should bid \$1,500, a sum sufficient to satisfy Hudson's judgment ; that the plaintiff should not bid, and in consideration thereof, that defendant would pay to the plaintiff \$700 whenever the Supreme Court of the United States should decide that obliga-

Dudley v. Odom.

tions for the purchase-money of slaves were valid debts, that being the character of the debt on which plaintiff's judgment was founded. The plaintiff did not bid at the sale, and the Supreme Court of the United States having decided that obligations for the purchase-money of slaves were valid debts, this action was commenced to recover the \$700 and interest.

The contract, as alleged in the complaint, was as follows :

"That the defendant, Noah Odom, knowing that a sufficient amount of money would be realized from the sale of his said father's real estate to satisfy the plaintiff's said confession of judgment, and fearing competition in the bidding when the said land should be offered for sale, applied to and induced the plaintiff to desist from bidding for the same, agreeing to and with the plaintiff, and promising that he, the said defendant, would pay the plaintiff the sum of seven hundred dollars, whenever the Supreme Court of the United States should decide that obligations given for the purchase-money of slaves were valid debts, if he, the said defendant, should be allowed to bid off the real estate of the said John Odom, without opposition from the plaintiff.

"That, in consideration of said agreement, and confiding in the promises and undertakings of the said defendant, supposing that he intended fairly and faithfully to carry out his promises made as aforesaid, he (the plaintiff) made no bid for the said land, which was sold at Bennettsville, S. C., on the 1st day of November, A. D. 1868, and was bought by the defendant for a nominal price, the sum of fifteen hundred dollars, much less than the real value."

The defendant's counsel contended that the contract as alleged and proved contravenes established principles of public policy, and is, therefore, null and void, and cannot be enforced in a court of justice. His honor declined so to rule, and instructed the jury that the contract was legal and binding.

The jury found for the plaintiff, and after judgment entered the defendant appealed.

Hudson, for appellant.

McIver, contra.

MOSES, C. J. The respondent held a second lien by judgment recovered in 1866 on the land of one John Odom, who, in 1868, was adjudged a bankrupt. His land having been advertised for sale by his assignee, on the day appointed therefor, Noah Odom (the

appellant), the son of said John, agreed with O. W. Dudley (respondent), that if he would desist from bidding on it, and allow him (the appellant) to bid it off without opposition from the respondent, he would pay him the sum of seven hundred dollars whenever the Supreme Court of the United States should decide that obligations given for the purchase-money of slaves were valid debts. The land, which was proved to be worth six thousand dollars at the time of sale, was bought by the appellant at fifteen hundred dollars—the only bid made. All knowledge of the agreement was confined to the parties and a third person, who was called as a witness to it. It was not denied that the validity of contracts for the purchase of slaves was sustained by the Supreme Court of the United States in May, 1872.

The action was brought for the recovery of the amount alleged to be due under the agreement.

On the part of the defense it was insisted “that the agreement or contract sued upon and set up in the testimony for the plaintiff is one that contravenes established principles of public policy, was, hence, illegal and void, and cannot be enforced in a court of justice.” The Circuit Court overruled the proposition of law thus submitted, and a verdict was rendered for the sum demanded, with interest thereon from the 1st day of May, 1872. The question which we have now to consider is, whether there was in this error of law on the part of the court?

It is not to be denied that contracts which are in violation of a positive statute, or of long-established and recognized principles of public policy, cannot be enforced in courts of justice.

The former speaks the will of the community through the legislative power, and demands a direct obedience, by the observance of all the obligations which it imposes. It is the expression of the public, in the most authoritative mode that it can use, to assert its opinion upon the subject-matter to which it relates. It is not essential to its validity that it should attach any penal provision for its violation. It may prohibit certain acts, and declare that all agreements made through their intervention shall be without force or effect. Upon analogous principles, and in the absence of all statutory regulations, considerations of public policy, long established, may operate to the full extent, as if enjoined by legislative enactment, to prevent the enforcement of contracts which are in contravention of them.

Dudley v. Odom.

They, too, in another form, speak the public will, not through the law-making power, but because the continued acquiescence of the community gives to the judicial decisions which announce it the force of law. Precedent following precedent, without interference on the part of the legislature, at last ripens into a common law, with all its consequences and sanction.

It is scarcely necessary to inquire whether the sale made here was an official one, for the rules which govern and regulate bidding at such sales apply to all public actions. It is true that they are more carefully watched and jealously regarded where the sale is under judicial process. We must hold the sale here to have been one made by the order of a competent court, for without it the assignee in bankruptcy could not lawfully sell the effects of the bankrupt.

Does an agreement at such a sale between two or more not to bid against each other contravene established principles of public policy?

It was the sale of the land of a bankrupt. The purpose was to obtain the largest possible price for the creditors by the competition through unrestrained bidding. Whatever was calculated to prevent the result which might thus be realized prejudiced the object which the court proposed by its order. Justice, not only to the owner of the property, but a sense of respect to the court, which, in fact, is the seller, require that when it orders a sale to the highest bidder no combination shall be made which may prevent a full and open competition among those who may be disposed to buy. Official sales without these safeguards would not reach the end contemplated by the orders which direct them. It is needless, however, to enlarge upon the views which look to the policy of the rule that demands a free and open field for all who propose to bid at such sales, for they are now comprehended in a principle which obtains not only in the court of equity, but that of law, and no where carried to a greater extent than by the decisions in our own State.

In *Jones v. Caswell*, 3 Johns. Cas. 29, the action was on a note given for forbearance to bid at a sale by the sheriff, and it was held "a consideration which ought not to be sanctioned in a court of justice." The judge delivering the opinion of the court says: "A combination to prevent fair competition is contrary to morality

and sound policy. It operates as a fraud upon the debtor and his remaining creditors by depriving the former of the opportunity which he ought to possess of obtaining a full equivalent for the property which is devoted to the payment of his debts, and opens the door for oppressive speculation." The same principle had been announced in *Doolin v. Wood*, 6 Johns. 194; in *Wilbur v. How*, 8 id. 444; and in *Thompson v. Davies*, 13 id. 112. Chancellor KENT, in *Troup v. Ward*, 4 Johns. Ch. 254, re-affirms the doctrine laid down in *Jones v. Caswell*, by a court of which he was then a member.

In this State the point was fully and at large considered by the Court of Errors, in *Hamilton v. Hamilton*, and *Martin and Walter v. Evans*, 2 Rich. Eq. 355, 368, in which it was held "that the principle which governs all sales at auction, and especially judicial sales, is that there should be full and fair competition. Any agreement or combination, therefore, the object and effect of which are to chill the sale and stifle competition, is illegal, and no party to the agreement or combination can derive benefit from the sale."

Chancellor DUNCAN, closing the opinion of the court, says, "the current of decisions is so uniform, and the general principle so clearly announced, that it is not deemed necessary further to consider its validity, or the importance of preserving it."

Chancellor HARPER, who delivered the dissenting opinion of the court, p. 389, says, "that the matter seems to have been put upon the proper footing in Massachusetts, in *Phippen v. Stickney*, 3 Metc. 384." There the rule, as laid down in the cases then before him, appears to have been narrowed, by requiring it to depend upon circumstances, showing an innocent intention, or a design to prevent competition and depress the price. Let the principle declared in *Phippen v. Stickney* be tested by the circumstances of the case now under review. The purpose of the sale was to obtain the highest price which might be offered. The agreement of the parties prevented this, for while the appellant obtained the land at his bid of fifteen hundred dollars, the agreement sued upon required that he should pay the additional sum of seven hundred dollars, not for the benefit of the seller, but for that of the respondent. Was the consideration which induced the agreement on the part of the appellant any thing but the forbearance of the respondent? In fact, his complaint avers "that the defendant, Noah Odom, knowing that a sufficient amount of money would be realized from the sale

Dudley v. Odom.

of his said father's real estate to satisfy the plaintiff's said confession of judgment, and fearing competition in bidding when the said land should be offered for sale, applied to and induced the plaintiff to desist from bidding on the same, agreeing to and with the plaintiff, and promising, that he, the said defendant, would pay the plaintiff the said sum of \$700, etc.; that, in consideration of said agreement, and confiding in the promise and undertaking of the said defendant, supposing that he intended fairly and faithfully to carry out his promises made as aforesaid, he (the plaintiff) made no bid for the said land, which was sold at Bennettsville, on the 1st November, 1868, and was bought by the defendant at a nominal price, the sum of \$1,500, much less than the real value."

Does not this allegation amount to a clear admission by the respondent of a combination or confederation for the purpose of preventing competition, and depressing the price of the property below its fair market value? Who but the plaintiff (below) had an interest in the bidding, after the bid which was stipulated to be made under the agreement? It was, by the understanding of the parties, to satisfy the senior judgment, and the creditor next in interest was the respondent himself, who preferred the seven hundred dollars rather than risk the purchase of the land at a price beyond the fifteen hundred dollars, which last sum he would have been obliged to advance if the land had been knocked off to him; for that amount was obliged to be paid before any of the purchase-money could be applied to his judgment. It appears idle to pursue the facts further, to show that they bring the case even within the rule contended for by the dissenting members of the Court of Errors in *Hamilton v. Hamilton*, and *Martin & Walter v. Evans*.

We have no idea that the respondent intended to violate any moral rule, but his agreement cannot be sustained because it is in disregard of law; nor have we any thing to do with the want of faith on the part of the appellant.

An English judge has properly said, "the law encourages no man to be unfaithful to his promise, but legal obligations are, from their nature, more circumscribed than moral duties."

The allegation that "the defendant, by his pleading, having put his defense upon a general denial of the contract sued on, cannot take advantage of any illegality in the contract," cannot prevail. No such exception was taken in the Circuit Court. On the contrary, the brief shows that the counsel for the appellant submitted

Central National Bank v. Charlotte, Columbia and Augusta Railroad Company

to the court his proposition of law, which impugned the validity of the agreement sued upon. "The plaintiff's counsel, in replying, first combatted the said legal proposition, and then addressing the jury upon the facts of the case rested." The exception not having been made in the court below, it cannot be interposed here.

The view which the court takes in regard to the principal question made in the cause renders unnecessary any consideration of the point submitted in regard to the interest allowed in the verdict.

The motion for a new trial is granted, and the case remanded to the Circuit Court.

New trial granted.

CENTRAL NATIONAL BANK v. CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(S. C. 156.)

Negotiable instrument — note of corporation — effect of seal.

An instrument in writing, having in every respect the form of a promissory note, except that the corporate seal was impressed, whereby a railroad corporation promised to pay to the order of A a certain sum of money, held to be a negotiable promissory note.

The seal of a corporation is equally appropriate as a means of evidencing its assent to be bound by a simple contract as by a specialty.

ACTION by the Central National Bank of Columbia against the Charlotte, Columbia and Augusta Railroad Company.

The case is fully stated in the opinion of the court.

Rion, for appellant, cited *Moss v. Oakley*, 2 Hill (N.Y.), 265; *White v. Vt. & Mass. R. R. Co.*, 21 How. 575; *Langston v. So. Ca. R. R. Co.*, 2 S. C. 248; *Cockrell v. Milling*, 1 Strobb. 445; *Giles, Davis & Hill v. Mauldin*, 7 Rich. 11.

McMaster, contra: *Eaves v. Cantzon*, 1 Brev. 308; *McKain v. Miller*, 1 McM. 314; Abb. Law of Corp. 207, §§ 1, 4; *Clark v. Farmers' Woollen Co.*, 15 Wend. 256; *Delafield v. Illinois*, 2 Hill (N.Y.), 159; 8 Paige, 527; *Morris Canal v. Fisher*, 1 Stockt. 667; *Carr v. LeFevre*, 27 Penn. St. 413; *Chapin v. Vt. & Mass. R. R. Co.*, 8 Gray, 575; *White v. Vt. & Mass. R. R. Co.*, 21 How. 575; *Brain-*

Central National Bank v. Charlotte, Columbia and Augusta Railroad Company.

ord v. N. Y. & H. R. R. Co., 25 N. Y. 496 ; 1 Para. on Cont. 291 ; 2 id. 721.

WILLARD, A. J. The plaintiff sued upon a promissory note in the following form:

“TREASURER’S OFFICE,
CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD Co.,
COLUMBIA, S. C., April 3, 1872. } ”

\$7,000.

Ninety days after date, The Charlotte, Columbia and Augusta Railroad Company promise to pay to the order of Jno. D. Caldwell seven thousand dollars, at Central National Bank, at Columbia, for value received.

[*Company’s Seal.*] (Signed) C. BOURKNIGHT,
Treas. C., C. & A. R. R. Co.”

“Indorsed :

JNO. D. CALDWELL.

W. B. GULICK.”

The plaintiffs are holders for value, having acquired the note before maturity, without notice of any defect of consideration. It is contended that the note is a specialty, and, as such, not negotiable ; that the consideration was the sale and delivery of certain promises in writing to pay money, issued by the State, and void, on the ground that they were issued in violation of that clause of the Constitution of the United States that forbids the issuing by States of bills of credit (see *Auditor v. Treasurer*, 4 S. C. 311), and that, therefore, the note is void.

The Circuit judge submitted to the jury, as a question of fact, whether it was the intention of the parties to the note to make a negotiable note or an obligation under seal. The jury found a general verdict for the plaintiff, which is equivalent to finding that the parties intended making a negotiable note. The Circuit judge refused a request to charge that as matter of law the note was not negotiable, to which an exception was taken. The present question is, whether that ruling is conformable to law.

The only feature of the note that is referred to as importing an intent to create an obligation under seal is the impression of the seal of the corporation on its face. The note would be perfect without this impression, being signed by the proper officer of the corporation. It is in the ordinary form of a negotiable promissory

note, with nothing beyond the mere presence of the seal itself to indicate an intention to give it any other character. The seal of a corporation is not, in itself, conclusive of an intent to make a specialty. It is equally appropriate as a means of evidencing the assent of a corporation to be bound by a simple contract as by a specialty. It is true that, ordinarily, negotiable instruments, made by corporations, are attested by the officers of the corporation without its seal. The act of 3 and 4 Ann (2 Stat. 544) contemplated both classes of notes as possessing a negotiable character, namely: those made by a corporation as such, and those made by the "servant or agent" of a corporation. If it is competent for a corporation to make a negotiable promissory note by its direct corporate act, then it is equally competent for it to attest such a note by its seal without destroying its negotiable character thereby. That a corporation possesses such competency is evidenced by the statute just referred to.

The authorities cited by appellants do not reach to the case in hand. We are not prepared to go beyond them in a direction where every step is a loss to legal certainty and to the convenience of commerce. The Circuit Court properly held the note to be negotiable.

The appeal should be dismissed.

Appeal dismissed.

JENKINS V. CHARLESTON.

(S. S. C. 303.)

Municipal corporation — right of, to tax its own bonds.

The stock of a municipal corporation, payable and transferable only at the treasury of the corporation, has its situs within the corporation, and the corporation may lawfully tax it whether held by a non-resident or a resident. Where a city taxes its own stock, it may enforce payment by deducting the amount of the tax from interest due on the stock.

ACTION by Jenkins against the city council of Charleston, to recover \$871.69, a balance alleged to be due by the defendant to the plaintiff for interest, at six per cent, which accrued during the years 1870 and 1871, on certain stock of the defendant owned by the plaintiff.

Jenkins v. Charleston.

The plaintiff was a citizen and resident of the State of Maryland, and owner of the stock in question. By ordinances of the city council of Charleston, passed to raise supplies for the years 1870 and 1871, a tax of two cents upon the dollar was laid for each of those years on the value of all property within the city, its stock inclusive, and the city treasurer was directed to retain the tax assessed on the city stock, out of the interest thereon, when the same is due and payable. The taxes assessed for the years 1870 and 1871, on the stock owned by the plaintiff, amounted to the sum above mentioned, and this sum was deducted by the city treasurer from the interest due the plaintiff for those years.

Neither any act of the State, nor the ordinance under which the stock was issued, declared it exempt from taxation.

The action was brought to recover the sum thus retained, with interest, and the ground chiefly relied upon was, that the ordinances imposing the tax impaired the obligation of the contract between the city and the owner of the stock.

There were four other actions tried at the same time, each brought by a different plaintiff, and all founded upon substantially the same state of facts and presenting the same question, the only difference as to one of them being that the plaintiff was a resident of the city.

The cases were tried by the court without a jury, and his honor, the Circuit judge, decided: (1) That the taxes were constitutionally and legally imposed; and (2) that the mode by which payment was enforced was lawful.

Judgments were accordingly entered for the defendant, and the plaintiff appealed.

Magrath & Lowndes, Porter & Conner, and DeSaussure, for appellants.

Seabrook, city attorney, and Pringle, contra.

MOSES, C. J. The general power of the city council of Charleston "to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, as shall appear to them expedient," is not disputed on the part of the appellants. Whatever may be the extent of its authority in this regard, or how far the legislature may have devolved upon it any of its own attributes of sovereignty, so far as the taxing power is concerned, within

its municipal limits, the only questions raised in the cases are : 1st. Can the city of Charleston tax its own stock ? 2d. If it is vested with this right, can it exercise it as to such of its stock as is held by non-residents ?

The argument on the general question was rested alone, by the appellants, on the ground that the tax imposed by the corporation impaired the obligation of the contract which existed between the holder of the stock and the city. That a contract was created imposing obligations on both parties, binding them to its performance according to its true intent, is too plain for doubt. The States are prohibited by the 10th section of the 1st article of the Constitution from passing any "law impairing the obligation of contracts," and if this right of the city council to levy the tax in question, which it could only exercise through the powers granted by its charter, is in violation of the said prohibition, it follows, as an inevitable consequence, that the parties must be relieved of the tax of which they complain.

Taxation is a power not only necessary but indispensable to governments. Its exercise by the States can only be controlled by constitutional limitations. While these are observed and recognized, the wise and prudent enforcement of the power must depend on the wisdom and discretion of those to whose hands the prerogative is intrusted. The mere possession of governmental powers, without adequate means of execution for the public good, would be but as a "barren sceptre" for defense. There may be other limitations, as where the power is resorted to for the purpose of attaining an end, which, under the taxing power, could not be legitimate, as, for instance, if under the guise of a tax the legislature designed to inflict a penalty. Mr. Cooley, in his *Constitutional Limitations*, p. 129, says: "Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposed, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives."

The general power being inherent in the government, those who deny the existence of the particular right sought to be enforced, must show it, as clearly forbidden by positive declaration, or arising from an implication too clear to be resisted. If the right of taxation existed as a power in the government at the time of the

Jenkins v. Charleston.

contract, and so entered into it as to become one of its necessary elements and attributes, then the obligation of the contract is not impaired by the imposition of the tax, because it was a property which attached to the contract and became one of its controlling attributes.

All property is held by individuals subject to the exercise by the State of the sovereign power which it holds over it. Where the State creates a municipal corporation, it devolves upon it a portion of that power, to the extent conferred by its charter. Whatever rights it can exercise, through its substitution in the place of the State, within its prescribed territorial boundaries, is by force of the very sovereign power which attached to the State. The duties of such a corporation are civil and political, as well as municipal. Where the right to tax has been conferred upon a body of that character, the intention to surrender it generally, or in any particular instance, must be shown by express act, or, as we have said in regard to its relinquishment by the State, by plain and unmistakable intent; in the language of *Ohio Life and Trust Company v. Debolt*, 16 How. 435, referring to *Providence Bank v. Billings* and the case of the *Charles River Bridge Company*, "by words too plain to be mistaken."

Mr. Dillon, in his treatise on Municipal Corporations, § 589, says: "The power of *taxation* and the power of *eminent domain*, subject to both of which all private property is held, although they originate in political necessity, are in their nature materially different. For the taxes paid or money exacted under the taxing power, no direct specific compensation is made, but where property is taken under the right of eminent domain, this can be done only to the limited extent required by the particular object or enterprise in favor of which it is exercised, and then only on the condition of making to the owner direct and full compensation in money for the *particular* and *unequal* sacrifice which he would otherwise be obliged to make for the public benefit."

The power of taxation is at least as high a prerogative of government as that of eminent domain, for while taxation does take private property for public use, it acts in this particular instance without the correlative obligation of compensation, for the reason that in the one case the property of an individual is taken for the public good, and made subservient to it without including other property similarly situated, while in the other all property of the

same kind is held subject to the imposition of a tax, and must contribute to the fund which it is proposed to raise.

In *West River Bridge Co. v. Dix*, 6 How. 507, while it was admitted that the charter was a contract between the State and the company, it was held "that the right of eminent domain did not interfere with the inviolability of contracts; that all contracts are made subject to that right, and the contract in question was not violated by its exercise."

In the opinion of the court it is said: "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed to be known and recognized by all; are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur. Such a condition is the right of eminent domain." At page 581 it is said: "No State, it is declared, shall pass a law impairing the obligation of contracts, yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large;" and, on page 582: "This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield, in every instance, to its proper exercise."

It is impossible not to perceive that the same principle which ran through and controlled the judgment in that case must apply where it is sought to resist the payment of a tax, because its imposition interfered with the inviolability of a contract.

Taxation is, in every regard, as much an inherent power of government as is that of *eminent domain*. Mr. Justice WOOLBERRY, in a separate opinion in the same case, page 539, says: "I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a State is derived from or

Jenkins v. Charleston.

protected by its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace." At page 542 he says: "And because, on a like principle, taxes may be enforced on such property, as well as all other property, though coming by grant from the State, and may be done without violation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it. This is well settled."

In *Gilman v. City of Sheboygan*, 2 Black. 513, Mr. Justice SWAYNE said: "The act of 1854 authorized the borrowing of money, the issuing of bonds, and the levying of a tax upon all the property in the city, for the purposes specified. The imposition, modification and renewal of taxes, and the exemption of property from such burdens, is an ordinary exercise of the power of State sovereignty. There is no pledge, express or implied, that this power should not thereafter be exercised."

In *Providence Bank v. Billings*, 4 Pet. 562, Chief Justice MARSHALL, delivering the opinion of the court, said: "The power of legislation, and, consequently, of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government, as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens, and that portion must be determined by the legislature."

In *Brewster v. Hough*, 10 N. H. 143, "the power of taxation" is said "to be essentially a power of sovereignty or eminent domain."

Mr. Justice MCLEAN, in delivering the opinion of the court in *State Bank of Ohio v. Knoop*, 16 How. 369, said: "The power of taxation has been compared to that of eminent domain, and it is said, as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act"

Is there any thing in the contract itself which by necessary implication can be construed into a stipulation or covenant for exemption from taxation by the city? The control remains undisturbed

— unchanged. The obligation on the city to pay the annual interest is not denied. The performance of all it imposes is admitted, and the agreement remains as perfect in form, and as binding in effect, as when it was first executed. But, it is said, if the city assesses a tax on the value of the stock, the holder does not receive the amount of the interest agreed to be paid. It is diminished to the extent of the tax. This result, however, is not effected by any change of the contract or refusal of the council to recognize it as imposing on them a liability to pay the accruing interest, but the stock becomes less valuable to the holder, because the authority representing, to a certain extent, the sovereignty of the State, interposes and lays a charge upon it for public purposes through a tax. The same consequence follows from the imposition of taxes by the city on all other property admitted to be liable to it. The tax on real property and on that of personal, having a tangible form, to the extent of its demand, lessens the value of such property. The tax from income, no matter from whatever source derived, necessarily reduces its amount. It is difficult to perceive why the propositions now insisted on by the appellants may not as well apply to the whole principle on which the right to tax is founded.

In the case of *Providence Bank v. Billings*, already referred to, Chief Justice MARSHALL uses this language : “ If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has in many, perhaps in all the States, been granted by government since the adoption of the Constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee; yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all, and the proposition appears so extravagant that it is difficult to admit any resemblance in the cases; and yet if the proposition for which the plaintiffs contend be true, it carries us to this point. That

Jenkins v. Charleston.

proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant is inconsistent with it, and is, therefore, impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth it may be supposed universal; but it is not universal, and, therefore, its truth cannot be admitted in these broad terms in any case. We must look for the exemption in the language of the instrument, and if we do not find it there it would be going very far to insert it by construction."

Mr. Blackwell, in his work on Tax Titles, pp. —, says: "If the tax is laid to raise a revenue for the expenses of the State, it shall be laid equally on all the property in the State." A resident of Charleston might convert his entire property into city stock, and according to the proposition contended for on the part of the appellant, while enjoying all the protection which the corporation afforded him, and all others in its limits, may contribute nothing to its support — not even to the very taxes through which the interest on his own stock is to be raised. The holders of all other property are to be assessed, while he, reaping all the advantages, bears none of the burthens of a property holder. Nor can the fact that the right may be abused operate to defeat its exercise. The same argument would apply to destroy all the functions of government.

As was said by Chief Justice MARSHALL, in his opinion from which we have already cited: "However absolute the right of an individual may be, it is still in the nature of that right that it must bear a proportion of the public burthens, and that portion must be determined by the legislature. The vital power may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State government. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express control against unjust and excessive taxation, as well as against unwise legislation generally."

Regarding the city stock as personal property liable to the tax imposed, it remains to be considered whether such stock, held by non-residents, can be taxed by the said corporation. The right is resisted entirely on the ground that personal property has no *situs* in itself, but follows the domicile of its owner. But this is not true as a general and unvarying rule, for its application will be found

to be trammelled and incumbered with so many exceptions, that the principle upon which its very existence depends is not only affected but destroyed. Personal property of a visible and tangible kind is taxed where it is found, without regard to the residence of the owner, and his domicile in one State will not so affect the possession of property beyond it as to subject it to taxation by the State in which he resides. If the rule contended for is without restriction, then the right to tax would be regulated, not by the actual *situs* of such personal property, but by the domicile of the owner. Mr. Story, in his 'Conflict of Laws, § 380, referring to the principle, says that "Lord LOUGHBOROUGH has stated it with great clearness and force in one of his most elaborate judgments."—*Sill v. Worswick*, 1 H. Bl. 690. "It is a clear proposition," said he, "not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession or by the act of the party." He evidently here restricts the rule to the disposition and transmission of such property. Chancellor KENT, in the first volume of his Commentaries, p. 406, refers to the rule as a "fiction of law," and says: "It may now be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicile with regard to the rules of preference in the case of insolvent estates." So, too, in regard to attachment laws, or any proceeding by which the court, not having jurisdiction of the person, obtains control of the property by its process against it, and makes it amenable to its judgment, thus acting on the party through his property, wherever the latter may be found, without respect to his domicile.

Mr. Story, in the same work first referred to, § 550, himself says: "The general doctrine is not controverted, that although movables are, for many purposes, to be deemed to have no *situs* except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary, for the purposes of justice, that the actual *situs* of the thing should be examined." Does it consist with our idea of the justice which should govern the daily transactions of men, that the State which protects the property

Jenkins v. Charleston.

that, by its proper and discreet arrangement, gives it additional value, should not receive the consideration for these results in contribution to its expenses, while the State which affords it no protection and adds nothing to its value, should control it through the mere domicile of the holder? If it cannot do this as to visible property, on what principle can the right be claimed as to stock, because it is a thing incorporeal. The chose has value, as well as the visible property. While the use of the latter may yield its possessor income, the stock does the same thing, and in the very place where it was issued.

In *Hoyt v. The Courts*, 23 N. Y. 228, in the opinion of the court, by LEMSTOCK, C. J., it is said: "These and other illustrations, which are mentioned, demonstrate that the fiction or maxim *mobilia personam sequuntur* is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances, the truth, and not the fiction, affords, as it plainly ought to afford, the rule of action * * * ; accordingly there seems to be no place for the fiction of which we are speaking in a well-adjusted system of taxation."

In *Green v. Van Buskirk*, 7 Wall. 139, it was held that "the fiction of law, that the domicile of the owner drew to it his personal estate, wherever it may happen to be, yields, whenever, for the purposes of justice, the actual *situs* of the property should be examined."

The case of *Cleveland, Painesville and Ashtabula R. R. Co. v. Pennsylvania*, 15 Wall. 300, is much relied on by the appellants, but we do not think that the ruling there can sustain the proposition on which the cases here depend. There the question presented, as the opening remarks of the opinion admits, "applies to the interest or bonds of the railroad company, made payable out of the State, issued to and held by non-residents of the State, citizens of other States." The stock involved here was issued by the city of Charleston, payable and transferable there, and there alone can renewals of certificates, in case of loss, be obtained. The opinion in the case just referred to admits that the *situs* of public securities does not depend on the domicile of the owner. On page 323 it is said: "It is undoubtedly true that the actual *situs* of personal property, which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the States in

which it may be taxed. The same thing is true of public securities, consisting of State bonds and bonds of municipal bodies, etc.; but other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner."

A clear and manifest distinction is here drawn between bonds of municipal corporations and those of private bodies and individuals. The title to bonds and debts generally cannot only be transferred anywhere, and legal demand of payment made on the debtor, and suit brought wherever he may be found, or, he being absent and his goods present, they may, by attachment proceeding, be subjected to their payment. But the debt of the municipal corporation is only transferable and demandable at its office, and it can only be sued in a court which has jurisdiction over territory within which its own limits are prescribed. All the qualities which demand it seem to give it a local existence, so far as its issue, transfer and payment are concerned.

We are sustained in the views which have induced our conclusion by the opinion of Chief Justice WAITE, in the case of *Tappan v. Merchants' Bank of Chicago*, 19 Wall. 490. He says, in the course of it, that "shares of stock in national banks are personal property. They are a species of personal property, which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner, for the purpose of taxation, and give them a *situs* of their own. * * * The shareholder is protected in his person by the government at the place where he resides, but his property in this stock is protected at the place where the bank transacts its business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interests in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporate bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so."

Objection has not been urged, in the argument, as to the particular mode provided by the ordinance for the collection of the tax.

Jenkins v. Charleston.

If the party was liable to the tax it worked no injury to him. Resort to summary proceedings at variance with the general spirit of our laws has been allowed against delinquent tax payers, and has been permitted very much by the necessity of the occasion, which requires energy and promptness in collecting the public dues of that character. *State v. Allen*, 2 McC. 59; Blackwell on Tax Titles, 28. A resident of the city might convert his whole estate into such stock, and the corporation left without remedy for the tax assessed upon it, unless it could be deducted from the interest payable to the holder. A non-resident holder of such stock could be reached for the tax in no other way.

All the cases involve the same questions, and the motion in each is dismissed.

Motion dismissed.

WILLARD, J., dissented.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

BALTIMORE AND OHIO RAILROAD COMPANY, appellant, v. WILKENS.

(44 Md. 11.)

Common carrier — bill of lading — fraudulent issue of, by agent

The station agent of a railroad company, having authority to sign bills of lading, fraudulently signed and issued a bill of lading for goods never received for transportation, and the consignee therein made advances on the faith of such bill. *Held*, that the railroad company was not liable therefor.

ACTION for money by Wilkens, as surviving partner of the firm of Benninghaus & Co. The opinion states the case. The court below gave judgment for the plaintiff on an agreed statement of the facts, and the defendant appealed.

John K. Cowen, for appellant. A bill of lading signed by the agent of the carrier, when the goods have not been received for shipment, does not bind the carrier; the agent's act is outside of the scope of his authority, and the owner of the line of transportation is not responsible for the *act* of his agent, which causes an *appearance of conformity* to his authority. See *Grant v. Norway*, 2 Eng. Law & Eq. 337; *Hubbersty v. Ward*, 8 Exch. 330; *Sears et al. v. Wingate et al.*, 3 Allen, 103; *Schooner Freeman v. Buckingham*, 18 How. 191; *The Loon*, 7 Blatchf. C. C. 244; *Fellows v. Steamer Powell and Owners*, 16 La. Ann. 316; 1 Parsons' Maritime Law, 185, note 2; Redfield on Carriers and Bailments, § 263; Story on Agency (6th ed.), § 451; Angell on Carriers, § 223; 1 Parsons on Contracts (5th ed.), 45; *Coleman v. Riches*,

Baltimore and Ohio Railroad Company v. Wilkena.

29 Eng. Law & Eq. 323 ; *Second National Bank of Toledo v. Walbridge*, 19 Ohio St. 425 ; S. C., 2 Am. Rep. 408 ; *Jessel v. Bath*, L. R., 2 Exch. 274 ; *Dean v. King*, 22 Ohio St. 118 ; *Louisiana Bank of New Orleans v. Laveille*, 52 Mo. 380 ; Smith's Mercantile Law (Ed. 1870), 297.

The plaintiffs were bound to ascertain whether the agent had exceeded his authority.

The duty of inquiry was incumbent on the plaintiff to see whether the agent had exceeded his authority. As they trusted without such inquiry, they trusted to the good faith of the agent and shipper, and not to the liability of the principal. Story on Agency, § 133, and note 2 to § 127 ; 1 Am. Lead. Cas. 552, 561 (4th ed.) ; *Mussey v. Beecher*, 3 Cush. 511 ; *Lowell Five Cents Savings Bank v. Inhabitants of Winchester*, 8 Allen, 118 ; *Stagg v. Elliott*, 10 C. B. (N. S.) 371 (104 E. C. L. 373). In *Adams Express Company v. Trego*, 35 Md. 68, this court has approved *Grant v. Norway*, *Coleman v. Riches*, and *Hubbersty v. Ward*.

Arthur Geo. Brown and *Fred. W. Brune*, for appellee. The appellant was responsible for the loss the appellee had suffered from the fraud of McCluskey, its agent. Code of Pub. Gen. Laws, art. 8, § 8 ; *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 36, 76, 78, 79, 80, 81, 102, 103, 104 ; *Hall v. Hinks*, 21 Md. 406, 416 to 420 ; *Lister, etc. v. Allen*, 31 Md. 543 ; *Merchants' Bank v. State Bank*, 10 Wall. 605, 644-7 ; *Dickerson v. Seelye*, 12 Barb. 99, 102 ; *Meyer v. Peck*, 28 N. Y. 598, 599 ; *McNeil v. Tenth Nat. Bank*, 46 id. 325 ; *Cartwright v. Wilmerding*, 24 id. 521 ; *Howard v. Tucker*, 1 B. & Ad. 712 ; *McNeil v. Hill*, 1 Woolworth, 96 ; *Michel v. Ware*, 3 Neb. 229 ; 1 Abbott on Shipping, 323 (margin) ; *The J. W. Brown*, 1 Bissel, 76, 79 ; Bigelow on Estoppel, 47 ; *Barwick v. English Joint-Stock Bank*, L. R., 2 Exch. 259, 265, 266 ; *Ranger v. The Great Western Railway Co.*, 5 H. of L. 86 ; *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 Privy Coun. Appeals, 394, 402, 410.

"If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who puts confidence in the deceiver should be a loser rather than a stranger." *Carpenter v. Longan*, 16 Wall. 273 ; *Hern v. Nichols*, 1 Salk. 289.

MILLER, J. This case presents an important question. It was tried before the judge of the Superior Court upon an agreed state-

Baltimore and Ohio Railroad Company v. Wilkens.

ment of facts, from which it appears that the appellant, with other railroad companies, formed an association under the name of the "Continental Line," for the transportation of freight to and from the west. Each company agreed to furnish a number of cars to run as through cars over the several roads, and each agreed *to guarantee the bills of lading of the association for goods loaded on such cars, and destined to points on other roads, as stated on the face of the bills of lading in this case*; the association had agents at various points in charge of its business, one of whom was Joseph McCluskey, who was agent of one of the western roads, and was acting as agent of the association at Owanico, Illinois, and as such was authorized to sign bills of lading for the association, and was also a merchant at Owanico, and did business with the appellees, Benninghaus & Co., commission merchants in Baltimore. By the course of this business, McCluskey consigned to Benninghaus & Co. car loads of grain, which they were to sell for him on a certain commission per bushel. As such shipments were made McCluskey forwarded the bills of lading, and drew drafts or bills of exchange attached to them, on Benninghaus & Co., which the latter honored and paid on the faith of the consignments mentioned in the bills of lading. In the course of this dealing, and between the 23d of June and the 9th of August, 1873, McCluskey fraudulently forwarded ten bills of lading for corn, purporting to have been loaded on eleven cars, *but which, in fact, never was so loaded or received at the depot, or on any cars of the association*; the drafts accompanying these fraudulent instruments were duly paid by Benninghaus & Co., upon the faith of the supposed consignments mentioned in them, without knowledge of this fraudulent conduct of McCluskey; and the latter having failed in business, and Benninghaus & Co. having made fruitless efforts to recover from him the amount thus advanced, they have brought this action to recover it from the appellant.

The several bills of lading referred to are substantially alike, and one of them is set out in the record as a specimen. It is duly signed by McCluskey as agent of the association, and bears a heading in this form: "CONTINENTAL LINE—FAST FREIGHT. The authorized fast freight Express of the Baltimore and Ohio," and other named "railroads and their connections, by whom it is owned and managed, *and its bills of lading guaranteed*," followed by a list of agents. The receipting clause is as follows: "Received at the

Baltimore and Ohio Railroad Company v. Wilkens.

depot of the S. I. S. E. R. R., Owanico, August 9th, 1873, of Joseph McCluskey, the following packages (contents unknown), in apparent good order." These initials designate The Springfield, Illinois and Southeastern Railroad, one of the roads forming the association, and mentioned in the above heading. Then follows: "*Marks* — Baltimore. *Consignee* — H. Benninghaus & Co. *Destination* — Locust Point, Baltimore, Md.," with a description of two cars by their numbers, each stated under the head of "Articles" as "1 car, bulk corn," with weight and rate of charges for freight. After which follows this notice: "It is understood that all connections recognize this bill of lading, and will settle freight accordingly. Should overcharges occur, and difficulty arise, delaying a prompt adjustment thereof, return bill of lading to the nearest agent or general freight agent of the Continental Line, with all freight bills paid the company delivering the freight, and this bill of lading attached for settlement. Claims for loss or damage must be presented to the delivering line within thirty-six hours after the arrival of the freight." Then follow a number of conditions usual in such instruments which it is stipulated the shipper agrees to, by "accepting this bill of lading."

We have thus stated, more at large than is usual in an opinion, the purport of the agreed statement of facts, and the terms of these instruments, because in the cause of the argument counsel for the appellees attached special importance to the statement set out on their face, that the association *guaranteed* its bills of lading. But looking to the agreed facts and the terms of these instruments, we are of opinion this guaranty simply means that each company composing this association stipulates that it will be bound by a bill of lading issued by any one of them, for freight to be transported over each and all the roads constituting the line, in the same manner as if the transportation was only over its own road. For instance, the Baltimore and Ohio Company, whose road extends from Baltimore to the Ohio river, by joining this association and making this guaranty, contracts that it will be responsible for bills of lading for freight, over any of the associated western roads, in the same manner it would be for an ordinary bill of lading over its own road from Baltimore to Wheeling. By this arrangement and guaranty the shipper, besides other benefits and conveniences, derives the advantage of the responsibility of each and all the associated companies, for loss or damage to his goods occurring on any

Baltimore and Ohio Railroad Company v. Wilkena.

part of the entire line, and the further advantage of suing the company nearest his home for such loss. Thus a shipper of grain or other produce to Baltimore or Philadelphia may sue his home company for loss or damage, occurring in the transportation between Wheeling and Baltimore, or Baltimore and Philadelphia, and in like manner, the Philadelphia or Baltimore merchant, shipping his goods to the west, may sue the Philadelphia, Wilmington and Baltimore, or the Baltimore and Ohio Company, for like loss occurring on any of the western connections of the line. This, in our opinion, was the intention and extent of this guaranty. It imparts no other or additional force or sanctity to the bill of lading. The circumstance of such guaranty places the responsibility of the appellant upon no higher ground than if it had issued an ordinary instrument of that character, for the transportation of freight over its own road exclusively.

This being so, is there any legal principle which makes the appellant responsible to a consignee for advances on a bill of lading fraudulently issued by its agent who was also his consignor, for goods never in fact received by it, and never placed in its cars? If any doctrine of commercial law can be regarded as well settled, it is, that the master has no authority to sign a bill of lading for goods *not actually put on board* the vessel, and, therefore, the owner of the ship is not responsible to parties taking, or dealing with, or making advances on the faith of such an instrument which is untruthful in this particular. The consignee and every other party thus acting does so *with notice* of this limitation of the power of the master, and *acts at his own risk* both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be shipped. In the early case of *Lickbarrow v. Mason*, 2 Term Rep. 75, it was said by BULLER, J., that a bill of lading is *negotiable*, and on this an argument has been frequently made (supported to some extent by the *dicta* of able judges) that a third person dealing with such instruments should be protected in his reliance on them, according to their exact tenor, against charterer and owners as well as masters. But in *Grant v. Norway*, 10 C. B. 665; (2 Eng. Law & Eq. 337), where the question was for the first time distinctly presented for adjudication in England, the Court of Common Pleas, after full consideration, held that the master of a ship signing a bill of lading for goods which had never been put on board, is not to be considered the agent of the owner

Baltimore and Ohio Railroad Company v. Wilkens.

in that behalf so as to make the latter responsible to an indorsee of the bill for value. That decision settled the law in England. It has been followed in many cases in which, in extension of the same principle, it has been held that a bill of lading so signed is not conclusive against the owner as to the *quantity* of goods or cargo shipped. Among the recent cases on the subject is that of *Jessel v. Bath*, L. R., 2 Exch. 267, from which we learn that Parliament, in legislating in the matter, has gone no further than to enact "that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, against the *master or other person signing the same*, notwithstanding that such goods or some part thereof may not have been so shipped." This act leaves untouched the principle and rule of law before stated, which has been thus firmly settled by the courts, and the vast maritime commerce of England has been, and is to this day, conducted subject to, and in recognition of, that rule. *Brown v. The Powell Daffryn Steam Coal Co.*, L. R., 10 C. P. 562.

In this country the Supreme Court of the United States in *Schooner Freeman v. Buckingham*, 18 How. 182, adopting the case of *Grant v. Norway*, have decided that neither the owner nor the vessel is responsible to an innocent purchaser or holder of a bill of lading, signed by the master for goods not actually shipped *and intended as an instrument of fraud*. They place their decision, as respects the non-liability of the owner, upon the ground of *want of authority* in the master, who, they say, "has no more an apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for *cargo actually shipped*; and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises; but the authority in *each case* arises out of, and depends on a particular state of facts; it is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, *even in favor of an innocent purchaser*, if the facts upon which his power depended did not exist; and it is incumbent upon those who are about to change their condition, upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends." So in other courts, where the question was directly presented, the same rulings have been made. Such were the decisions in *Sears v.*

Baltimore and Ohio Railroad Company v. Wilkena.

Wingate, 3 Allen, 103, in the case of *The Loon*, 7 Blatchf. C. C. 244, in *Fellows v. Steamer Powell and Owners*, 16 La. Ann. 316, in *Dean v. King*, 22 Ohio St. 118, and in *Louisiana National Bank of New Orleans v. Laveille*, 52 Mo. 380. We have in fact been referred to no case either in this country or in England (nor have we found any) in which a contrary decision has been made where the question was *necessarily* and *directly* raised for adjudication. We take it, therefore, that this doctrine is too well grounded in the commercial jurisprudence of both countries, to be longer open to question or doubt.

Nor have we any difficulty in applying that doctrine to the instruments before us in this case. A bill of lading is a very ancient but not exclusively a sea document. It has been long used in both countries by carrying companies in transportation on lakes and rivers by steamboats, as well as sailing vessels, and on canals, and in all such cases it has been denominated and treated as a commercial instrument. In later times similar documents have been commonly if not universally used by railway companies in land carriage. What good reason exists why this principle should not apply to them, as well as to bills of lading used in shipping? We see none. On the contrary, are there not much stronger reasons for its application to this class of documents? The master of a ship is necessarily clothed with a real as well as an apparent authority, much more extensive than belongs to the station agents of a railroad company. His control over the vessel, his power to make contracts respecting it, his discretion in the use and management of it for the benefit of his owners, on the high seas and in distant ports, reach far beyond those of the latter. A bill of lading signed by him and forwarded by mail oftentimes arrives at the port of destination months before the vessel and cargo, and the necessities as well as the convenience of commercial transactions, requiring its transfer, and advances on the faith of it, are much stronger than can possibly exist in dealing with similar instruments in railway transportation. In the latter but a few days usually intervene between the arrival of the bill of lading by mail, and the goods by the cars, and besides this, the telegraph is at hand affording to any one, asked to make advances on the faith of such documents, easy and speedy means of ascertaining whether the goods have been in fact laden in the cars or received at the depot of shipment or not. If, therefore, there be any good reason for exempting the owner of

Baltimore and Ohio Railroad Company v. Wilkena.

a vessel from responsibility for a bill of lading, false in this respect, signed by the master who is his agent, it must apply *a fortiori* to a railway company, with respect to similar acts of its station agents along its line of road. The rule has been applied to a receipt given by the agent of a wharfinger purporting to be for goods received at the wharf, when in fact they were not (*Coleman v. Riches*, 16 C. B. 104 [29 Eng. Law & Eq. 323]), and to receipts by a warehouseman for goods received at his warehouse. *Second National Bank of Toledo v. Walbridge*, 19 Ohio St. 419. The law in fact regards none of these instruments as *negotiable*, in the same sense in which a bill of exchange or a promissory note is so. They stand in the place of the goods they represent, and delivery or indorsement of them transfers the right of property in the goods, but not in the contract itself, so as to enable the indorsee to maintain at the common law an action on it in his own name. Thus in *Thompson v. Dominy*, 14 Mees. & Wels. 403, PARKE, B., said: "I have never heard it argued that a contract was transferable except by the law merchant, and there is nothing to show that a bill of lading is transferable under any custom of merchants;" and ALDERSON, B., added: "This is another instance of the confusion, as Lord ELLENBOROUGH in *Waring v. Cox* expresses it, which 'has arisen from similitudinous reasoning upon this subject.' Because in *Lickbarrow v. Mason* a bill of lading was held to be *negotiable*, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only." Neither a railroad company nor a shipowner can be made liable in a case like this, upon any theory that these instruments are negotiable like bills of exchange. The liability in either case must depend on the question of the authority of the master or agent, to bind his principal by such acts. And as we have seen, it has been conclusively settled that no such authority exists, and that every one taking such instruments, or making advances on the faith of them, must be regarded as having notice of this want of authority, and acts at his own risk and on the responsibility of the master or agent alone for damages, as to the truthfulness of the statements appearing on the face of such documents, that the specified goods have been shipped or received at the depot for transportation.

Baltimore and Ohio Railroad Company v. Wilkena.

This well-settled principle we did not intend to disturb by our decision in the *Parkersburg Stock Cases*, 39 Md. 36; S. O., 17 Am. Rep. 540. These cases were carefully considered, and we there determined that the corporation was responsible for the acts of its treasurer and transfer agent, who surreptitiously and fraudulently issued, for his own benefit, false and forged *certificates of stock* of the company, and passed them off upon the commercial public who advanced money on pledges of them, and received, treated and acted upon them as genuine. This treasurer and transfer agent was made, by the company, the custodian of the ledger and other books relating exclusively to the ownership and transfer of its capital stock; he was authorized to prepare and countersign all certificates of stock to be issued, and to affix the company's seal (which was intrusted to his keeping and placed in his office) to all such certificates when signed by the president; he was, in fact, constituted the executive officer of the corporation with large discretionary powers, and was held out by the company to the public as the proper party from whom information as to the ownership of its stock was to be ascertained, and, in fact, *as the source* of information on that subject. In this way the public were, by the acts of the corporation, "exposed to the risks of fraudulent devices most dangerous because most difficult to detect." The authority of such an officer, both real and apparent, differs widely in its extent and scope from that of a mere station agent. The instruments issued in those cases are also of an entirely different character from those issued in this case. The distinction between them has been well stated in the brief of the appellant's counsel. Stock in corporations is intangible property. Stock certificates are not promises to do any thing with particular articles of property, but simply statements of ownership of shares or interests in property. It is the peculiar province of the treasurer and transfer agent, whom the company authorizes to give and make such statements, to make known to the commercial public dealing with the stock, the facts of such ownership and to whom the shares belong. But a bill of lading performs a very different function. It evidences and is a contract for the transportation of goods, and not an instrument intended to give information as to the ownership of intangible property. The agent who signs it is not held out to the public as authorized to make statements like those in a certificate of stock, but only to make contracts to carry visible and tangible property. The property which is thus stipulated to be carried being visible and

Third National Bank of Baltimore v. Boyd.

tangible, the fact whether it has been shipped or received at the depot for shipment or not can be determined and easily determined in a multitude of ways without applying to the agent. To the general doctrines on which our decision in these *stock cases* was based, there is and must be the exception of the recognized and well-settled principle of commercial law in reference to bills of lading which we have stated and which governs the present case.

But even under the doctrine upon which the appellee's counsel rely that "if one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who puts confidence in the deceiver should be the loser rather than a stranger," we do not clearly see how the appellees are strangers to this transaction, or how it can be said the company, more than they, put confidence in the deceiver, for whilst the deceiver was the company's agent, he was also their consignor with whom they had been doing business. If as agent he deceived the company, as their consignor with whom they were dealing, he equally deceived the appellees, and if they relied on him as an honest and trustworthy consignor and business correspondent and dealer, and were deceived, as they undoubtedly were by him, how can it be consonant with reason and justice for them to shift their loss arising from such confidence and trust upon those who were equally deceived by the same party? But, however this may be, we rest our decision upon the principle of commercial law as fully set forth in this opinion. Being satisfied the appellees are not entitled to recover upon the facts stated in the agreement upon which the case was submitted to the Superior Court, we shall reverse the judgment appealed from and give judgment for the appellant.

Judgment reversed, and judgment for the appellant.

THIRD NATIONAL BANK OF BALTIMORE, appellant, v. BOYD.

(44 Md. 47.)

National bank — power of, to take collateral security — deposits for safe-keeping — measure of damages on loss of bonds.

A national bank received from a customer bonds as collateral security for a debt then existing, and for future obligations. Afterward, and after the customer had paid his indebtedness, the bonds were stolen from the bank.

Third National Bank of Baltimore v. Boyd.

Held, (1) that the bank was not a gratuitous bailee of such bonds; (2) that it had power to take the bonds as security for existing or future loans; (3) that it was liable if it failed to exercise ordinary care and diligence in keeping the bonds; and (4) that the measure of damage was the value of the bonds when stolen and not when demand of them was made.

ACTION by Boyd to recover the value of certain stocks and bonds. The opinion sufficiently states the case. The verdict and judgment were for the plaintiff, and the defendant appealed.

Henry Stockbridge & Thomas Donaldson, for appellant.

John H. Thomas & S. Teackle Wallis, for appellee.

BARTOL, C. J. This suit was brought by the appellee, to recover the value of certain coupon bonds and stocks, that passed like bank notes, by delivery, which had been deposited by the plaintiff with the defendant, and which had been stolen from the defendant, in consequence of its alleged failure to exercise ordinary care in the custody of them.

The case is one that, from its nature, depended at the trial below mainly on the questions of fact arising upon the evidence, with regard to the manner in which the bonds were lost, and the vigilance and care exercised by the bank in their custody. These were questions exclusively for the jury, whose province it was to decide whether there was any want or omission of ordinary care and diligence on the part of the bank, from which the loss of the plaintiff's property resulted. These questions were submitted to the jury by the Circuit Court, were decided by them against the bank, and we have no authority or power to review their verdict.

All the prayers asked by the defendant, being either conceded by the plaintiff's counsel or granted by the Circuit Court except the *tenth*, the only matters presented for our consideration on this appeal arise upon the defendant's *tenth* prayer, which was refused; and the *first*, *fourth*, *fifth*, *sixth* and *seventh* prayers of the plaintiff, which were granted.

It appears by the evidence that the appellant was a bank organized under "*the National Currency Act of 1864*." The firm of William A. Boyd & Co., of which the appellee was senior member, was a large customer of the bank, through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th day of February, 1866, the

Third National Bank of Baltimore v. Boyd.

firm was indebted to the bank about \$5,000, when the appellee voluntarily proposed to the president of the bank to deposit with the bank a large amount of bonds, about \$37,000, as collateral security for his present and future indebtedness. The terms of the deposit as agreed on between Mr. Boyd and the president were dictated by the latter to the discount clerk — and were as follows:

“THIRD NATIONAL BANK, *February 5, 1866.*

“William A. Boyd has deposited with the Third National Bank of Baltimore \$20,000 in United States 5-20 bonds, and \$1,500 5-20 July, 1865; \$5,000 Hudson County, New Jersey; \$5,000 Town of Saratoga, New York, 7 *per cent* bonds; \$5,000 stock of Third National Bank of Baltimore, as collateral security for the payment of all obligations of Wm. A. Boyd and Wm. A. Boyd & Co., to the Third National Bank of Baltimore, at present existing, or that may be incurred hereafter, with the understanding that the right to sell the above collaterals in satisfaction of such obligations is hereby vested in the officers of the Third National Bank.

(Signed)

“A. H. BARNITZ,
Discount Clerk.”

This paper was kept by the cashier of the bank in the same envelope with the bonds — afterward *memoranda* were inclosed therein, signed by the appellee's attorney and by the cashier, showing that certain of the bonds originally deposited had been withdrawn, and others deposited to replace them.

It appears from the evidence “that while these collaterals remained in the bank, the firm kept a deposit account with the bank, having an average amount of about \$4,000 on deposit, and from time to time as it needed, obtained discounts ranging from \$2,000 to \$15,000 on the security of the collaterals, but frequently, and for considerable times, as much as five months at a time, it sometimes owed the bank nothing, but left the bonds in its vault; that at times when the firm wanted money for a very short time, it had obtained it from the bank, on the security of these collaterals on what were called ‘call loans’ by checks such as the following :

“BALTIMORE, *July 13, 1871.*

“Third National Bank of Baltimore pay to order of call loan on general collaterals, *four thousand dollars.*

“WILLIAM A. BOYD & Co.”

Third National Bank of Baltimore v. Boyd.

“The firm was not indebted to the bank subsequent to July, 1872, when it paid its last indebtedness; the bonds were not withdrawn, but left with the defendant, under the original agreement.” The bank was robbed and the bonds stolen in the manner described in the testimony, between Saturday evening, the 17th, and Monday morning, the 19th of August, 1872. It appears from the proof that the giving of the bonds as collateral security was the voluntary act of the plaintiff, not done at the instance or request of the defendant; that the bank officers considered the account of the plaintiff’s firm a very desirable one, and considered the arrangement by which every liability of theirs was secured by the collaterals, very advantageous to the bank; “which was under no obligation to lend them any thing; but the bonds and stocks were to be held as collateral security for all loans that might be made to them, and for their liability on any paper signed or indorsed by them, which might at any time be held by the bank.”

The defendant, by its *tenth* prayer, asked the court to instruct the jury “That the defendant had no power, by the act of Congress under which it was incorporated, to assume and undertake the keeping of the plaintiff’s bonds, while they were not held as collateral security for debts owing to it, and if the jury shall find that when the bonds were stolen * * * there was not, and had not been for nearly three weeks, any indebtedness for which they were held as security, that the plaintiff cannot recover in this action.”

This prayer raises the question of the power of the bank to accept and retain the deposit of the plaintiff’s bonds, in the manner and for the purpose disclosed in the evidence. Having been organized under the act of Congress of 1864, ch. 106, the powers of the bank are limited and defined by the provisions of that act.

By section 8 it is authorized “to exercise all such incidental powers as shall be necessary to carry on the business of banking by discounting promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this act.”

The construction of this section was considered by this court in *Weckler v. First National Bank of Hagerstown*, 42 Md. 581; S. U., 20 Am. Rep. 95. The precise question, however, now presented, did

Third National Bank of Baltimore v. Boyd.

not arise in that case. There the attempt was made to hold the bank responsible for alleged fraudulent representations made by its teller in the sale of bonds of the Northern Pacific Railroad Company, which the *narr.* alleged the bank was engaged in selling on commission. It was decided, that "the business of selling bonds on commission was not within the scope of the powers of the corporation," under the act of Congress to which we have referred. It was further held that the defense of *ultra vires* was open to the bank under the decision in "*The Steam Navigation Co. v. Dandridge*, 8 G. & J. 318, 319; and consequently that the bank was not responsible for any false representations made by its teller to the plaintiff, whereby she was induced to purchase the bonds in question." It is contended that the case now under consideration comes within that decision. In the argument of the cause, the counsel for the appellant has treated the transaction as a mere gratuitous deposit, simply for the convenience or accommodation of the appellee, and for the purpose of affording a place of safe-keeping for his bonds, and has argued that the bank had no power to accept a bailment of that kind, or in other words, to become a mere safe deposit company, and was not, therefore, responsible for the loss. There is very strong ground, both upon reason and authority, in support of the proposition that a national bank, deriving its existence and exercising its powers under the act of Congress referred to, is not authorized to enter into a contract as a mere gratuitous bailee, by receiving on special deposit for safe-keeping merely, coin, jewelry, plate, bonds or other valuables. Such a contract does not appear to be authorized by the terms of the 8th section, as a transaction "within the ordinary course and business of banking or incident to it;" and has been decided by the Supreme Court of Vermont to be unauthorized by the law, and beyond the scope of the corporate powers. *Wiley v. First National Bank of Brattleborough*, 47 Vt. 546; S. C., 19 Am. Rep. 122. The very-well-considered opinion by Judge WHEELER in this case will be found in *The American Law Register*, N. S., Vol. 14, page 342, accompanied by an able note from the pen of Judge REDFIELD, in which the cases are collected and reviewed.

In the case of *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y. 278; S. C., 19 Am. Rep. 181, the Court of Appeals of New York have recently made a similar decision.

Assuming these decisions to be correct, and we are not disposed

Third National Bank of Baltimore v. Boyd.

to question their soundness, it is clear that the contract entered into by the bank in this case was not a mere gratuitous bailment. As shown by the paper of February 5th, 1866, the bonds were not received on special deposit, *for safe-keeping merely*, but were received as collateral security for a debt then existing, and for all obligations that might thereafter be incurred by the depositor.

We entertain no doubt of the power of the bank to enter into a contract of that kind. To accept such collateral security for existing debts and for future loans and discounts is a transaction within the usual course of the business of banking, and incident thereto, and, therefore, within the terms of the act of Congress.

The power of national banks to receive such deposits was distinctly recognized by the Supreme Court of Vermont and the Court of Appeals of New York, in the cases before cited, and we are not aware that it has ever been questioned. On this point we refer to the able opinion of Judge SHARSWOOD, in *Erie Bank v. Smith, Randolph & Co.*, 3 Brewst. 9.

In *Maitland v. The Citizens' National Bank*, 40 Md. 540 ; S. C., 17 Am. Rep. 620, this court affirmed the right of a national bank to receive on deposit the note of a third person as collateral security for future loans or advances to the depositor.

The original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the appellee's debt had been paid. There is no evidence that the contract was changed; on the contrary, the evidence shows "the bonds remained with the bank under the original agreement," as collateral security for any indebtedness of the appellee that might thereafter accrue, and for any liability of himself, or of the firm of which he was a member, or any paper signed or indorsed by them, which might at any time be held by the bank. For these reasons the Circuit Court committed no error in refusing the appellant's tenth prayer.

The appellant's counsel have argued that the memorandum of February 5th, 1866, cannot be construed as a contract made by the appellant, because it does not appear that the officers by whom it was made were authorized to bind the bank.

This point is not properly before us, was not made in the Circuit Court, and is not presented by the bill of exceptions. All the prayers of the appellant go upon the theory that the bonds were held by the bank as collateral security.

Third National Bank of Baltimore v. Boyd.

But, even if the question of the authority of the officers to bind the appellant were open on this appeal, it may be observed that the contract of bailment being one which it was competent for the corporation to make, and having been made by its officers, acting within the scope of their general powers and apparent authority, and in the exercise of powers usually delegated to like officers, the bank would be estopped to deny their authority. It may be added further, that there was evidence from which the jury might properly have inferred that the authority had been conferred upon the president and cashier, and that their acts were known to and sanctioned by the directors. *Union Bank v. Ridgely*, 1 H. & G. 325, 413, 430.

But, as we have before said, the question of the authority of the officers to act for the bank in the transaction is not before us. 29 Md. 2, Rule 4.

With respect to the several prayers of the appellee which were granted by the Circuit Court, and referred to in the bill of exceptions, we do not understand that any objection is made to them by the appellant, so far as they instructed the jury upon the question of the degree of care which the appellant's officers were bound by law to exercise in the custody of the appellee's bonds. In this respect they do not differ from the prayers granted at the instance of the appellant.

By the appellee's *first* prayer, the jury were instructed that the defendant would be responsible if the jury found from the evidence that the bonds had been stolen, "in consequence of the failure on the part of the defendant to exercise such care and diligence in the custody or keeping of them as, at the time, banks of common prudence, in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of said property, and to have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant." No objection has been made, nor could any be justly urged against this proposition. The prayer further instructed the jury, that in determining whether or not such care and diligence were used, "the jury may take into consideration whether it was a proper precaution for the defendant to have had an inside watchman at night, and on Sundays, whether such watchman ought to have kept awake at night, and whether

Third National Bank of Baltimore v. Boyd.

the bank ought ever to have been without an inside watchman at any part of the day on Sunday, and that they may take into consideration the nature and value of said bonds, their liability to loss, the temptation they offered to theft, the difficulty of recovering them if stolen, the situation of the building and vault, and the sufficiency of the safe in which the defendant kept them at the time they were stolen."

Exception has been taken to the last part of the prayer, because of the enumeration of certain questions, as proper to be considered by the jury, in determining whether such care and diligence had been used by the bank, as was defined in the prayer. But we find no error in this part of the instruction ; the particular subjects of inquiry mentioned were proper for the consideration of the jury ; their province was not invaded, nor was there any thing to mislead them ; they were not told that in any of the particulars mentioned, the evidence showed a want of due and ordinary care on the part of the bank ; and by the appellee's *seventh* prayer, they were instructed, "that it was a question to be determined by them from all the facts and circumstances in the case, whether there was or was not that degree of care and diligence used by the defendant, in the protection and preservation of the plaintiff's property, which is defined in the plaintiff's first prayer."

The degree of care and diligence required by the law was properly defined by the Circuit Court ; the question, whether it had been exercised by the defendant, was fairly submitted to the jury upon all the facts and circumstances of the case. This was a question of fact, exclusively within the province of the jury to decide. We have no power to disturb their verdict, and we have refrained from stating the facts and circumstances showing the manner in which the most extraordinary and unforeseen robbery was committed upon the bank.

The only question left for us to consider is, as to the proper measure of damages. This was decided by the Circuit Court to be, "the value of the bonds at the time they were stolen." The appellant contends that this was error, and insists that the true measure is their value on the 9th day of September, 1872, when they were demanded by the appellee. It appears by the agreement of counsel that the bonds had slightly diminished in value between the time of the robbery and the time they were demanded. At

Third National Bank of Baltimore v. Boyd.

the former date they were worth \$25,911.25, and at the latter their value was \$25,400.63.

In our opinion the rule laid down by the Circuit Court is correct. In a case of this kind the measure of damages is the value of the property lost; the only question is, at what time is this value to be computed? Its value not being fixed and permanent, but liable to fluctuate, the time fixed for ascertaining it may become of much importance, and has been the subject of considerable discussion in the courts, and the decisions are by no means uniform. In Maryland the measure of damages in *trover* is ordinarily the value of the property at the time of the conversion (*Hepburn v. Sewell*, 5 H. & J. 211; *Stirling v. Garrites*, 18 Md. 468) and we think the same rule may, by analogy, be applied to the present case. Here the ground of the action is the alleged breach of the contract of bailment, by reason of the failure on the part of the bank to exercise due care in the custody of the bonds, whereby they were lost; the true measure of damages would seem to be their market value, computed at that time. This question arose in *Maryland Marine Ins. Co. v. Dalrymple*, 25 Md. 244. In that case there was a pledge or hypothecation of stock as collateral; the contract of bailment having been broken by the illegal sale of the stock by the bailee, the other party, being cognizant of the breach, waited for two years, and the stock having risen in the market, demanded the same, offering to redeem, and claimed that the value of the stock should be computed at the time of his demand. But it was held that the measure of damage was its value at the time of the breach.

Without repeating the reasons and authorities upon which that decision was placed, we refer to the opinion of the court at pages 305, 306, 307, 308.

In *Maury and Osbourn v. Coyle*, 34 Md. 235, cited by the appellant, it was ruled that the plaintiff was entitled to recover the value of the bonds deposited, ascertained at the date they were demanded. But that case is not applicable here; there was no evidence of the time when they had been lost, or that they had changed in value; and the contract there sued on was not the same as this. In that case, by the contract of bailment, the bailee had the option to return the securities deposited, or their value in money on demand. In this case, the legal obligation of the bailee was to keep the bonds of the appellee safely, and to return *them* to him when the contract ended. Strictly, this obligation could not be discharged by the

Witthaus v. Braun.

payment to the appellee of their value in money ; after the bonds had been lost, and it had become impossible to return them, there was no necessity for a demand, and when made, it could have no significance or effect in determining the rights of the parties, these had become fixed when the breach occurred, by the loss of the bonds, and in our judgment, the proper measure of damages is the value computed at that time. Finding no error in the rulings of the Circuit Court, the judgment must be affirmed.

Judgment affirmed.

WITTHAUS V. BRAUN.

(44 Md. 303.)

Trade-mark — assignment of.

The mere sale of a trade-mark, apart from the article to which it is affixed, confers no right of ownership ; but where a trade-mark is used to designate the place and person by whom certain goods are manufactured, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made.

ACTION for an injunction. The opinion states the case.

Thomas J. Morris & E. Otis Hinkley, for appellant.

Arthur W. Machen, for appellees.

ROBINSON, J. The complainant seeks to restrain the appellees, who are manufacturers of smoking tobacco, from making use of a brand which he alleges to have been the trade-mark of one Moses Falk of the city of New York, and to the exclusive use of which he claims to be entitled as the assignee of Falk.

The brand or trade-mark in question may be described as follows: A label, in the center of which is a picture of an Irish harp with a shamrock on each side of the harp, and below it the words "*Erin, go Bragh,*" on the left of the harp the word "trade," and on the right the word "mark ;" above the harp the words "Genuine Dublin Cut Cavendish," and at the bottom the words "Smoking Tobacco." The label is printed in gold letters, on dark green paper.

Witthaus v. Braun.

The right of the complainant to the trade-mark thus described is founded upon the following assignment :

“ NEW YORK, *November 5th*, 1873.

“ In consideration of one cent paid to me, I have this day sold all my smoking tobacco brands to Mr. E. L. Witthaus, of the firm of H. Wilkens & Co., of the city of Baltimore.

“ MOSES FALK.”

The appellees contend that a trade-mark being a mere device or symbol, to designate *the manufacture of an article by a particular person, or at a particular place*, there is no such thing as a right of property in such trade-mark, *apart from the article to which it is affixed, and which it has been used to designate*, and that a purchaser, therefore, can acquire no right of property by the bare sale of the trade-mark itself.

Conceding this to be so, it is equally well settled that where a trade-mark is used to designate the place and the person by whom the goods are made, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made.

Since the cases of *Banks v. Gibson*, 34 Beav. 566; *Hall v. Barrows*, 10 Jur. (N. S.) 56; *Bury v. Bedford*, 33 Law Jour. Ch. 465; and *The Leather Cloth Co. v. The American Leather Cloth Co.*, 11 H. of L. Cas. 523, this can no longer be considered an open question. In the latter case, Lord CRANWORTH said : “ But I further think that the right to a trade-mark may, in general, treating it as property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the trade-mark has been used to be affixed, and may be lawfully used by the purchaser.”

“ In such a case the use of the trade-mark would indicate only that the goods so marked were made at the manufactory which he had purchased.”

Now, in this case the tobacco was manufactured by H. Wilkens & Co. for Moses Falk, and according to his directions, or, as termed in the trade, “ *by his secret*,” and the assignment of the trade-mark, under such circumstances, *to the manufacturer* would, in our opinion, bring this case within the principle of the decisions referred to.

The *mere sale* of a trade-mark, *apart from the article to which it is affixed*, confers no right of ownership, because no one can claim the right to sell his goods as goods manufactured by another. To

permit this to be done would be a fraud upon the public. But where, as in this case, the trade-mark is assigned *to the person who manufactured the tobacco*, to which the trade-mark was affixed, there is no false representation to the public, because the tobacco is still manufactured at the same place and by the same person. It is, in fact, the same article.

But the difficulty in the case is in regard to the proof upon which the right of Falk himself to the trade-mark depends. In order to justify the interposition of a court of equity by writ of injunction, this right ought to be established by the most satisfactory proof. If the testimony is conflicting and the right doubtful a court of equity will not interfere, but leave the parties to their remedies at law.

Falk says the label was designed by him in the latter part of 1867, and that the tobacco was manufactured for him by H. Wilkens & Co. in the latter part of 1868, and that at that time there was no such thing as smoking tobacco called "Dublin Out Cavendish" sold in small packages.

The testimony of Trowe, Neurath, Schwanebeck, Schneydler and Felgner tends very strongly to prove that Falk was the original proprietor of the label in question.

On the other hand, it is, we think, satisfactorily established, that at the time when Falk claims to have designed the brand, and for some time prior thereto, a smoking tobacco, known as "The Dublin Cut Cavendish," was sold in small packages, and that upon the labels affixed to the packages was the picture of an Irish harp, with the shamrock on each side, and the words "Erin go Bragh" below, all printed in gold letters, on dark green paper, and strongly resembling the brand now claimed by the appellant.

In addition to this, Seeman, who was engaged during the late war in supplying sutlers in the army with smoking tobacco, says "that the label which Falk claimed to have designed was at that time used on smoking tobacco — that he purchased, in 1864, tobacco put up in small packages, to which these labels were affixed; and that in the spring of 1868, and also in 1869, he purchased the same tobacco with the same labels of John B. Braun, one of the appellees."

Seitz, who was a manufacturer of smoking tobacco, testifies that the label now used by the appellees, and which the complainant alleges to be an imitation of Falk's trade-mark, was used in 1864

Magruder v. Colston.

by witness, and that he sold a number of these labels with his stock of tobacco to Braun, one of the appellees, in 1864.

Braun, who is produced as a witness on the part of the complainant, says: "the label now used by him is the same which he found together with other labels among the stock purchased by him of Seitz."

It must be admitted, then, that the testimony in regard to the right of Falk to the ownership of this label is conflicting and contradictory, and in fact it is no easy matter to determine on which side the weight of evidence preponderates.

Under such circumstances, we do not think a court of equity ought to interfere by a writ of injunction, and the decree below will be affirmed.

Decree affirmed.

MAGRUDER v. COLSTON.

(44 Md. 349.)

National bank — liability of pledges of stock.

Stock in a national bank was pledged to secure a debt, with power to the pledgee to sell it on default of payment. *Held*, that a sale by him pursuant to the power was not voidable as a fraud on creditors of the bank, though he sold because he believed the bank insolvent, and in order to escape personal liability as a stockholder.

Persons who hold stock of a national bank in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the national banking act, stockholders, and so long as they thus hold the stock in pledge are responsible to the creditors of the bank in proportion to the amount so held.

ACTION by Magruder, as receiver of the Merchants' National Bank, of Washington, against Colston and others, to recover, from the defendants, as stockholders of the said bank, the par value of stock in said bank. The opinion states the case.

The jury rendered a verdict for the defendants, and from the judgment entered thereon plaintiff appealed.

William M. Merrick, for appellant. The holder of stock, knowing a bank to be insolvent, for the purpose of escaping

his responsibility to the creditors of the bank, cannot lawfully transfer his stock for nominal consideration to a man of straw, and thereby rid himself effectually of his obligation to contribute an amount equal to the value of his stock to satisfy the debts of the bank under the 12th section of the banking law.

Fraud vitiates every thing, as well an assignment of stock as any other act intended to prejudice the rights of innocent parties. *Marcy v. Clark*, 17 Mass. 334; *Holyoke Bank v. Burnham et al.*, 11 Cush. 183 to 186; *Roman v. Fry*, 5 J. J. Marsh. 634; *Moss v. Oakley*, 2 Hill, 270; *Adderly v. Storm*, 6 id. 624 to 628; *Hale v. Walker*, 31 Iowa, 344, 354; *Matter of the Empire City Bank*, 18 N. Y. 223; *Rosevelt v. Brown*, 1 Kern. 148; *Onslow v. Corrie*, 2 Madd. 340; *Ex parte De Pass*, 5 Jurist (N. S.), 1193, 1194; Angell & Ames on Corporations, § 623; *Orease et al. v. Babcock et al.*, 10 Metc. 547.

Charles Marshall, for appellees.

GRASON, J. The question presented by some of the prayers, as to the organization of the Mechanics' National Bank of Washington, having been abandoned by the counsel of the appellant, the questions before the court upon this appeal arise upon his third and fourth prayers, which were rejected by the court below, and the appellee's second prayer, which was granted. The record shows that, some time before the failure of the bank, the appellees, who were bankers and brokers in Baltimore city, lent to Bayne & Company eight thousand dollars, payable on call, and took from them, as collateral security for repayment of the loan, one hundred shares of the stock of the Merchants' National Bank of Washington, fifty shares of which were in a certificate standing in the name of Oscar A. King, and indorsed in blank by him, and the remaining fifty shares in a certificate standing in the name of Bayne & Company, and indorsed in blank by them. The appellees held these two certificates until the 26th day of April, 1866, when, having previously called upon Bayne & Co. for repayment of the loan, and they having made default and instructed the appellees to sell, the latter requested the bank to transfer the stock to them and to issue certificates to them in their own name for it. The bank transferred the fifty shares standing in King's name and issued the certificates therefor to the appellees, but refused to transfer the fifty shares standing in the name of Bayne & Co., because Bayne & Co. were

Magruder v. Colston.

indebted to the bank. The appellees sold the whole of the stock to Colston on the 2d day of May, 1866, for one dollar, and delivered to him the certificate for the fifty shares originally standing in the name of King, as well as the certificate standing in the name of Bayne & Co., and the bank thereupon issued a new certificate to Colston in his own name for the fifty shares originally standing in King's name, and delivered it to him on the 2d day of May, the day before the bank failed, and while it was still open and doing business. The appellees proved that at the time of the sale they did not consider the stock worth any thing, and that they intended, when they made the sale to Colston, to avoid complication and difficulties, fearing that the bank, which they had heard was in difficulties, might prove insolvent. They further proved that Colston was not pecuniarily responsible for the amount of the par value of the stock so sold and transferred to him. The bank closed its doors on the 3d day of May, at 3 o'clock, P. M., and turned out to be insolvent, and this suit was brought by the receiver to recover from the appellees, as stockholders of the bank, the par value of the fifty shares of stock, the certificate of which had been issued to them, and by them transferred to Colston. Upon these facts the appellant's third and fourth prayers asked instructions that if the jury should find that the transfer of the fifty shares of stock was made by the appellees to Colston, with a view and for the purpose of evading or escaping their responsibility under the twelfth section of the national banking act, such transfer constituted no defense to this action, and did not relieve the appellees from the responsibility which would have attached to them in case the transfer had not been made, and that, if they had so sold the stock under their agreement with Bayne & Co., as a pledge to secure a loan of money, they were still responsible in law to the same extent as if they had been the absolute owners and had sold the legal title to the stock. The appellees' second prayer contained the converse of these propositions.

The 12th section of the national banking act provides for the personal liability of stockholders of national banks for the debts of the corporation, in proportion to the amount of stock held by them, and enacts that every person, becoming a shareholder by transfer, shall succeed to all the rights and liabilities of the prior holder of such shares. After a careful examination of the authorities, cited in the argument, we are of opinion that persons who

hold stock in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the banking act, stockholders, and, so long as they thus hold the stock in pledge, are responsible to the creditors of the bank in proportion to the amount so held. The reason for this is obvious. The stock stands on the books of the bank in his name and he is thus held out to the public as shareholder, and persons dealing with the bank have no means of knowing the nature of the contract under which he holds the stock, and have a right to presume, and are led to believe that he is the absolute owner of it, and it is but fair to presume that they deal with the bank upon the faith and credit of parties thus appearing as stockholders. Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock. Until this is done they continue to be stockholders within the meaning of the banking act. If we depart from the terms of the law and inquire into the equities which may exist between the stockholders and third persons, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may have been done by the corporation. If creditors must look beyond the legal title, as exhibited by the books of the bank, they can never know against whom to proceed. *Rosevelt v. Brown*, 1 Kern. 153; *Adderly v. Storm*, 6 Hill, 624; *Worrall v. Judson*, 5 Barb. 210; *Crease et al. v. Babcock et al.*, 10 Metc. 545; *United States Trust Co., of New York, Receiver, v. The United States Fire Ins. Co.*, 18 N. Y. 224; *Holyoke Bank v. Burnham et al.*, 11 Cush. 187. These cases arose under State laws making stockholders in corporations personally liable for the debt of the corporation, but the principles announced in them are applicable to cases arising under the act of Congress of 1864, ch. 106. That act makes stockholders only personally liable, and the appellees had parted with their stock when the bank failed, and had, therefore, ceased to be stockholders.

But it was contended by the counsel of the appellant that inasmuch as the assignment and transfer of the stock was made to Colston, under the circumstances detailed in the proof and for a nominal consideration, and with the view and purpose of avoiding any complications and difficulties in which a failure of the bank might involve them, the transfer was a fraud upon the creditors of the bank, and the appellees ought, therefore, to be held to the same

Magruder v. Colston.

liability to which they would have been subjected had they never made the transfer. It must be recollected, however, that they had no right, under their contract with Bayne & Co., to hold the stock as their own property, but had to sell it after the default of the latter in repaying the loan. The only case that bears directly upon this question to which we have been referred, or which we have been able to find, is that of *Holyoke Bank v. Burnham*, reported in 11 Cush. 187. In that case Joseph Burnham transferred certain shares of stock of a manufacturing company to Charles Burnham, who gave his note to Joseph for eight hundred dollars, and the agreement between the parties, provided that any time within two years either party should have the right to rescind the sale by a re-transfer of the shares and a surrender of the note. Within the two years the sale was rescinded by Joseph surrendering the note, and Charles re-transferring the shares. Suit was brought against Charles as shareholder of the corporation, by one of its creditors under the personal liability act of the legislature of Massachusetts, and it was held that as the shares of stock had been re-transferred under a stipulation which formed part of the original contract between the parties, Charles Burnham was not liable, notwithstanding the transfer had been made for the purpose of avoiding liability under the act. The case was heard by five of the six judges of the Supreme Court of Massachusetts, and Judge DEWY, in delivering the opinion of the court, says: "As to the second question, the right of the defendant to re-transfer to Joseph Burnham the eleven shares and thus divest himself of subsequent liability arising from his holding stock, the contract between the parties made at the time of the transfer, authorizing such re-transfer at the election of the parties at any time within two years, becomes material, and we are of opinion that under the agreement made at the time of the transfer, and the re-transfer being only an act in execution of it, it is not obnoxious to the charge of having been done in fraud of creditors, although its leading object and purpose might have been, on the part of the defendant, to avoid liability as a member of said corporation. *

* * It is unnecessary to consider, therefore, the general question how far persons owning shares in a manufacturing company may, by transferring them to some third person with a view to avoid liability as such owner to the creditor, effectually do so in the absence of such original contract for a re-transfer."

In this case it was part of the original contract between Bayne &

Maryland Mutual Benevolent Society v. Clendinen.

Co. and the appellees, that the latter should sell the stock upon the failure of the former to repay the loan upon call, and the sale to Colston was only in execution of it. These facts are very similar to those in the case of the *Holyoke Bank v. Burnham*, and the justice and reason of the principle applied in that case commend themselves to our approval, and we think it ought to be applied to this, and so applying it we find no error in the rulings of the court below.

Judgment affirmed.

MARYLAND MUTUAL BENEVOLENT SOCIETY V. CLENDINEN.

(44 Md. 429.)

Power — exercise of, by will. Assets — fund due from charitable society.

By the rules of a benevolent society, a sum was payable upon the death of a member, to his widow, children, or such persons to whom he might have disposed of the same by will or assignment; and if there should be no widow or children, and no disposition by will or assignment, the fund should go to the permanent fund of the society. A member died unmarried and without issue, and by his will gave the "entire residue" of his "estate," after payment of debts and funeral expenses, to his three sisters. *Held*, (1) that the fund due from the society was not assets recoverable by his administrator or executor, but only the subject of a power; and (2) that the will was not an exercise of the power, and, therefore, the fund went to the society.

ACTION by Clendinen, as administrator of Ferdinand Stansbury, deceased, against The Maryland Mutual Benevolent Society of the Improved Order of Red Men, to recover money. The opinion states the case.

Luther M. Reynolds, for appellant.

Thomas R. Clendinen, for appellee.

BOWIE, J. The appellants are an incorporated benevolent society, organized "with a view to aid the families of deceased members," and "to secure to the widow, child, or children of deceased members the sum of one dollar from each member of the association." Charter, art. 1. The appellee is the administrator, with

Maryland Mutual Benevolent Society v. Clendinen.

the will annexed, of Ferdinand Stansbury, a deceased member of the society, who sued the appellants in Baltimore City Court, at May term, 1875, and claimed that his testator was a member in good standing of the appellants' society, and died about February, 1875 ; that upon his death, the sum of \$280 became payable to such persons to whom he may have disposed of the same, by will or assignment, under article 7 of its by-laws ; that said Stansbury left a will devising his entire estate to four persons named, his three sisters and his friend Lowenbach, and that plaintiff was duly appointed administrator *c. t. a.*, and thereby became entitled to receive every thing which belonged to F. Stansbury's estate, or could pass by his will, including the sum of \$280, so as above devised ; that the plaintiff had demanded payment of the appellants, and complied with all its regulations upon the subject, but the appellants had refused. The defendants pleaded *non assumpsit*. The case was submitted to the court upon an agreed statement of facts.

The plaintiff contended upon these facts, that by a proper legal construction of the charter of the appellants (a copy of which was in evidence), the verdict should be for the plaintiff ; while the defendants maintained that the money did not pass by the will. The court decided that the fund or money did pass by the will, to which the defendants excepted, and the judgment being for the plaintiff, the defendants appealed.

At the trial of the cause, it was admitted " that the plaintiff had the right to bring the suit as it was brought (meaning, as was conceded in argument, he was administrator of said Stansbury) ; that the defendants were duly incorporated ; that Stansbury died leaving neither widow nor children, and was at the time of his death a member of the corporation in good standing, and that there were then 276 other members of the corporation. It was further admitted that the following is a true extract from the will of Ferdinand Stansbury, dated the 8th February, 1875, viz. : " After the payment of all just debts and funeral expenses, by my executor, out of my estate, I devise as follows : I give and bequeath the entire residue of my estate to my three sisters, Emma C. Arnold, Mary Florence Skinner and Grace Rose, and my esteemed friend Mary E. V. Lowenbach, each of them to have and receive a fourth part thereof absolutely ;" and that the annexed constitution and by-laws are the rules and articles by which the defendants are governed.

Maryland Mutual Benevolent Society v. Clendinen.

The plaintiff read the first and second sections of article 7, as follows :

Sec. 1. Upon the death of a member of the association, the president shall draw his order upon the treasurer (countersigned by the secretary), within sixty days after receiving proper notice of the same, for the sum of one dollar for every member of the association whose name may be on the books at the time of the death of the member, and the treasurer shall forthwith pay the sum so called for, to the widow, child, children, or such person or persons to whom the deceased may have disposed of the same by will or assignment.

Sec. 2. If there be no widow, child, or children, or the deceased shall have made no disposition by will or assignment of the sum accruing upon his death, then the board shall appropriate such sum as may be necessary for funeral expenses, and all excess of money accruing from the death of such member shall go to the permanent fund of the association.

Articles 10 and 11 define what constitutes the permanent fund, and its final disposition. By the former, the permanent fund shall consist of entrance fees, reinstatements, amount left over according to second section, article 7, and interest.

By the latter, if the association should be reduced to 250 members, two-thirds of the board of managers may settle up its affairs, pay its debts (if any), and the balance of *the principal and interest of the permanent fund* be divided among the members whose names are recorded on the books of the association. The question is, whether the fund assigned by this charter to the widow and children of the deceased, or to his legatee or assignee, becomes, upon his death, assets, which will pass to his administrator or executor, under a general residuary clause of a will, not referring to the power, or the fund.

This charter is a contract or covenant between its several members, with each other, and the corporation created by it, to reciprocally perform its several stipulations and obligations.

Each member binds himself to pay a stipulated entrance fee, and a certain sum upon the death of any of his associates, within a given time, upon notice; and on the other hand, upon the death of any member, the corporation, by its president, is required to pay a sum of one dollar for each surviving member, to the widow, child, children or legatee or assignee of the deceased. Whether this char-

Maryland Mutual Benevolent Society v. Clendinen.

ter invests the member with an interest or property, in the sum to be paid over to his widow, legatee or devisee, or only with a power of disposing of the same, is first to be determined.

2d. If the charter only entitles the member to a power, has that power been exercised or not?

“A power is defined to be a *liberty* or *authority* reserved by, or limited to, a party to dispose of real or personal property for his own benefit, or for the benefit of others, and operating upon an estate or interest, vested either in himself or in some other person; the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partially.” Butler, note 1 to Co. Litt, 342, *b*; 1 Chance on Powers, § 1. Again, “That a person having a power over property has not, in strictness, any interest in, or right or title to, the property to which the power relates, appears in early authorities” (*Albany's Case*, 1 Rep. 110, *b*; *Lampet's Case*, 10 Rep. 48, *b*; Co. Litt. 265, *b*); “though where the power is for his own benefit, he has the means of acquiring such interest, right or title; and in all cases, by the execution of the power, the possession, right, title or interest is altered or divested.” Id., § 2.

The interest acquired by a member of this association is not one payable to himself, or for his own benefit, further than his funeral expenses.

It is not a “*debitum in presenti, solvendum in futuro*:” if the deceased had only a power, and not an interest or property in the sum or fund, it was not assets.

In 2 Chance on Powers, § 1820, it is said: “That an ordinary power is not in itself assets, is clear, from all the cases.”

This cannot be classed among the assets to be returned by an administrator in his inventory; it is not “*a chose in action*,” or any species of personal property.

We know of no case in which the “*jus disponendi*” authorized by charters, under provisions like the present, has been declared a mere power; but powers arise at common law, under bonds to convey estates as another shall appoint, or to pay sums of money, as another shall appoint either generally, or among children, or under covenants for like purposes. 3 Atk. 656; 1 Ves., Sr., 86; Oro. Car. 219, 376, and other cases cited in 1 Chance on Powers.

We cannot see why an authority or privilege acquired under a

Maryland Mutual Benevolent Society v. Clendinen.

charter, to be exercised for the benefit of another, should not be governed by the same rules.

To make such funds subject to administration, under our testamentary system, would be a total subversion of the objects of the corporation, and a violation of the contract between the corporators.

The second question arising on the bill of exceptions is, whether the will, under which the appellee claims, operates as a valid execution of the power?

This question was very fully examined and discussed in the case of *Mory, Ex'x of Michael, v. Michael*, 18 Md. 241. There the power was created by a marriage contract, giving the wife authority to devise and bequeath the sum of money, "as if she were a *feme sole*;" we cannot better express the law on this point, than in the language of the court in that case, viz.: "The question submitted is, therefore, limited to the operation of the will, as an appointment within the terms of the contract, upon the principal sum assigned by it to the appellee. The execution of a power of appointment by will must be intended, and *the intention must be clearly manifested*. The rule of construction by which such an intention may be ascertained is explicit and exhaustive, and may be thus concisely stated: The intention to execute a power of appointment by will must appear by *a reference in the will to the power, or to the subject* of it, or from the fact that the will would be inoperative without the aid of the power. Sugd. on Powers, 301, 303; 4 Kent's Com. 385; 1 Story's C. C. 427. In this case the will affords no evidence of a design to execute the power by either of the modes designated in this rule. It neither refers to the power nor to the sum of money which was the subject of it, nor is it inoperative for want of property to give it effect as a testamentary act."

In the case now under consideration there is no evidence to show that the testator had or had not other estate, on which his will might operate; so that no inference can arise, from the want of other property, in favor of the supposed appointment. The other *indicia* of the absence of intention to exercise the power exist in full force; there is no reference to the power or the subject-matter on which it was to act.

Our conclusion, from these premises, is, that the fund sued for was not assets, recoverable by an administrator, *cum testamento annexo*,

Hardesty v. Richardson.

or executor, and that the will of the deceased was not a valid execution of the power; in the absence of which, and of an assignment, there being no widow, child or children, after paying the funeral expenses the excess shall go to the permanent fund of the association.

Judgment reversed.

STEWART, J., dissented.

HARDESTY V. RICHARDSON.

(44 Md. 617.)

Parol gift of land — when irrevocable in equity.

A father made a parol gift of land to his son, and the latter entered into possession and made valuable improvements in reliance upon such gift. *Held*, that the gift was irrevocable in equity, and a conveyance of the land to the son would be decreed.

BILL in equity for an injunction upon the following facts:
In December, 1869, the appellant, Richard S. Hardesty, brought an action of ejectment against his son, Richard O. Hardesty, to recover a farm in Harford county called "Wilna," and recovered judgment in May following.

In August, 1870, Richard O. Hardesty filed this bill on the equity side of said court against the appellant, a resident of Baltimore city, praying an injunction against the execution of said judgment and for the specific performance of an alleged contract by his father for the conveyance of said land. The injunction was issued as prayed. After answer filed the complainant died, and the appellee, his executor and trustee, as also the *cestuis que trust*, were made parties, testimony was taken, and after argument the case was submitted.

The court decreed a perpetual injunction and a conveyance in fee simple of said land to the trustee by Richard S. Hardesty, the defendant.

From this decree the present appeal was taken. The facts of the case are sufficiently stated in the opinion of the court.

Henry W. Archer and *Henry D. Farnandis*, for appellant. An agreement to merit the interposition of a court of equity must be fair, reasonable, *bona fide*, certain in all its parts, mutual and for a good and sufficient consideration. If any of these be wanting equity will not relieve. *Geiger v. Green*, 4 Gill, 472, 475; *Waters v. Howard*, 8 id. 262, 277, 282; *Mundorff v. Kilbourn*, 4 Md. 459, 464; *Rider, etc., v. Gray*, 10 id. 282; *Stoddert v. Bowie*, 5 id. 18, 28, 34.

The complainant must make out by clear and satisfactory proof the very contract laid in the bill, and part performance must be of the identical contract set up. 1 Story's Eq. Jur., § 762; *Beard v. Linthicum*, 1 Md. Ch. Dec. 345, 348-9; *Duvall v. Myers*, 2 Md. Ch. Dec. 401, 406; *Mundorff v. Kilbourn*, 4 Md. 459, 462.

Acts of alleged part performance must be referable exclusively to the alleged contract. They cannot prove the contract which must be first clearly established. *Bowie v. Stonestreet*, 6 Md. 418.

Alleged acts of part performance have different import when between strangers and between father and child; such as would, in the first case, imply a contract might, in the second, be referred to something else. *Waters v. Howard*, 8 Gill, 262; *Eckert v. Eckert*, 3 Penn. 332-65.

Equity will not enforce a voluntary contract to give or convey though in part performed. *Black v. Oord*, 2 H. & G. 100; *Pennington v. Gittings*, 2 G. & J. 208; *Lloyd v. Brooks*, 34 Md. 28; 1 Story's Eq. Jur., §§ 706, 793, *b*. As to voluntary contracts *inter vivos*, the general principle is that equity will not interfere, but leaves them where the law finds them. 1 Story's Eq. Jur., § 706; *Lloyd v. Brooks*, 34 Md. 28.

Equity will not generally enforce a voluntary settlement against the settler, though it will against his heir. *Haines v. Haines*, 6 Md. 435, 444. Natural love and affection will support a deed, but not sufficient to enforce a voluntary agreement. *Pennington v. Gittings*, 2 G. & J. 208, 217-18.

The consideration must be embodied in and be part of the contract. The two cases most relied upon by the appellee in his argument below are clearly distinguishable from this. In *King's Heirs v. Thompson and Wife*, 9 Pet. 218, it was clearly proved that King agreed to convey the land if Thompson would make the improvements. They were made subsequently, but, being according to the agreement and part of it, were a sufficient consideration. So, in

Hardesty v. Richardson.

Haines v. Haines, 6 Md. 435, the court found it unequivocally proved that a like contract had been made, viz., that if Mordecai did certain improvements the father would convey. But in the case at bar there is no room for a contract by implication. An express contract is set up, a definite consideration stated as part of that contract, on which alone the complainant can have relief. The subsequent improvements are not alleged to have been in pursuance of the agreement set up, or to have been any part of the consideration or any part of the contract, and cannot be relied on to give it validity.

The decree must be according to the *allegata et probata*, nothing is in issue but what is alleged in the bill. 1 Daniel's Ch. Pr. 377, and note 2. Even if the contract be proved, a decree for specific performance is not *ex debito justitiæ*, but the court will exercise a sound discretion in view of all the circumstances in determining whether to decree specific performance or not. *Geiger v. Green*, 4 Gill, 472, 475; *Waters v. Howard*, 8 id. 262; *Manning v. Wadsworth*, 4 Md. 59; *Crane v. Gough*, id. 316, 331.

Edwin H. Webster and *John H. Price*, for appellees.

ALVEY, J. In all applications like the present, the rule is certainly strict in requiring the most satisfactory evidence of the contract sought to be enforced. The proof must be clear, definite and conclusive as to the fact of the gift, and those acts done on the faith of it which render inequitable any attempt by the donor to avoid the gift. But where the proof is thus clear, and all other conditions are shown to exist to entitle the party to the assistance of a court of equity, that court will not hesitate to lend its aid, simply because the proof may rest entirely in parol.

Here the proof is definite and conclusive that the farm "Wilna" was purchased by Richard S. Hardesty, the father, for Richard O. Hardesty, the son, upon the latter's selection. The farm was purchased with the distinct understanding that the son should at once take possession, hold and use it as his own; the father repeatedly admitting and stating to divers persons, and as if he desired it to be so understood by every one, that he had purchased the farm for his son and had given it to him, and placed him in possession of it as exclusive owner. And in accordance with these admissions and statements by the father were the continuous pretensions and con-

duct of the son, from the time of his taking possession, in the fall of 1864, to the time of his death, in 1871. He was all the while in the exclusive possession and enjoyment of the farm as his own. It was assessed to him, and he paid all the taxes on it, from the time it was purchased down to the time when the father sought to recover it by virtue of the legal title held by him. The buildings on the farm were insured by and in the name of the son; and in obtaining the insurance the father made representations in reference to the ownership of the farm, which, when taken in connection with the other facts of the case, would seem to be quite conclusive against him. He introduced his son to the officers of the insurance company as an applicant for insurance, and in answer to a specific inquiry as to the ownership of the farm, he stated that he had purchased the farm for his son, and that as soon as some preliminary arrangements were made, he intended to make him a deed for it; that he had given him the farm. The preliminary arrangements referred to were, doubtless, the procuring the conveyance of the legal title from the Messrs. Tyson, from whom the farm was purchased, and with whom there was some misunderstanding or controversy as to the quantity of land to be conveyed. Additional insurance was subsequently obtained, also upon the representations of the father, that his son had made extensive alterations and improvements in the dwelling-house, costing between \$2,500 and \$3,000; and it was upon these representations that the insurance officers acted, in receiving the applications signed by the son as owner, and issuing the policy to him in his name. What reason or motive could have prompted the father to make these representations, if they were not true? Indeed, the same question may be asked with reference to the many other statements of the same import, made to other persons who have testified distinctly and circumstantially to conversations with the father upon the subject. It is hardly fair to suppose that he intended at the time to deceive either the son or the public in regard to the matter. And not only was the son placed in the possession by the father, accompanied by the declarations that the farm had been purchased for, and was given to him, but the proof is quite conclusive, indeed, not at all controverted, that the son expended considerable sums of money in building and repairing buildings on the farm, and in improving the farm generally. This was all done with the knowledge and apparent full approbation of the father. From the circumstances under

Hardesty v. Richardson.

which the farm was purchased, the manner in which it was held and used by the son, and the amount of money expended in improving it, in connection with the representations of the father, the conclusion is irresistible that it was the understanding from the beginning that the farm was to be conveyed to the son, so soon as the legal title was acquired by the father. Nor was this unreasonable or at all unnatural. The farm cost only about \$11,500, and the father had but four children, and was a man of large means. He appears to have had a special motive in inducing the son to become a farmer, and to settle in the country, away from misleading associations of the city. The latter, moreover, was about to be married, and it appears to have been the purpose of the father to give the son a good start in the world.

But it is insisted by the appellant that the contract as alleged in the bill was purely a voluntary one, without consideration, and that the subsequent improvements placed on the farm are not alleged to have been made in pursuance of the agreement, or to have been any part of the consideration therefor, and that, consequently, the contract is not shown to be of a character to be enforced, conceding it to be fully proved as alleged. In this, however, we do not agree. We think the contract sufficiently alleged, and that the proof fully supports it as alleged.

It is true, it is neither alleged nor proved that it was any part of the agreement or understanding that the farm was to be improved by the son, as a condition upon which he was to receive a conveyance of the title from his father; but it is alleged and abundantly proved that large expenditures were made in permanent improvements upon the land, with the knowledge of the father, and which were induced by and made upon the faith and in consideration of the father's promise to convey the land. This constitutes a good equitable consideration, which courts of equity will protect and enforce. In such cases the court relies not so much on the contract, which falls within the Statute of Frauds, as on the acts done under it subsequently, on the faith that the promise will be performed by the other party. When, therefore, a gift has led to the expenditure of money or labor on the land given, in making permanent improvements of considerable extent, the gift becomes irrevocable in equity, as it would operate a fraud on the donee to allow the donor to avoid the performance of his undertaking. "The Statute of Frauds requires a contract concerning real estate to be

Hardesty v. Richardson.

in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed. And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property." *Neale v. Neales*, 9 Wall. 1; Amer. note to *Lester v. Foxcroft*, 1 Lead. Cas. Eq. 625, 734. This principle is fully and clearly maintained by this court, as it is in many of the other courts of the country. The cases of *Shepherd v. Bevin*, 9 Gill, 32, and *Haines v. Haines*, 6 Md. 435, fully illustrate the doctrine; and the cases of *King v. Thompson and wife*, 9 Pet. 204; *Kurtz v. Hibner*, 55 Ill. 514; S. C., 8 Am. Rep. 665; and *Freeman v. Freeman*, 43 N. Y. 34; S. C., 3 Am. Rep. 657, relied on by the appellee, are equally explicit in support of the principle upon which we decide this case. The facts of the case of *Freeman v. Freeman* were very analogous to those involved here. In that case, it was held that the expenditures made upon the land, on the faith of the promise to give the land, in permanent improvements, constituted in equity a consideration for the promise of the plaintiff, and that the performance of the promise, although by parol, could be enforced in equity, and that an action of ejectment would not lie, in that State, against the defendants in possession.

Upon the whole, we think the decree of the court below was right, and, therefore, affirm it with costs.

Decree affirmed.

CASES
OF THE
SUPREME COURT
OF
ILLINOIS.

HOLLIDA, appellant, v. HUNT.

(70 Ill. 102.)

Patents—statute restricting sale of, void.

A State statute required vendors of patent rights to procure a certificate from the county clerk, and provided that every written obligation, the consideration of which was a patent right, should contain the words "given for a patent right," and that such obligation should be subject to all defenses as if owned by the promisee. *Held*, unconstitutional and void as an attempt to regulate and control by State legislation a matter of which Congress has sole jurisdiction. (*See note, p. 67.*)

ACTION of assumpsit by Hunt against Hollida and Ball upon a promissory note given by the latter to one Davison and assigned by him to plaintiff. The plaintiff had judgment in the court below and the defendants appealed.

Pepper & Wilson, for appellants.

Bassett & Connell, for appellee.

SCHOLFIELD, J. The question is presented, by the first error assigned, whether the act entitled "An act to regulate the sale of

patent rights, and to prevent frauds connected therewith," approved March 25, 1869, can be sustained as a valid and constitutional enactment.

The substance of its several provisions is as follows :

The first section makes it unlawful for any person to sell, barter, or offer to sell or barter, in any county in the State, any patent right, without first making the affidavit and proof required by the second section.

The second section requires any person desiring or intending to barter or sell any patent right, before offering to barter or sell the same, to submit to the clerk of the County Court of the county in which he desires to pursue such business, for his examination, the letters patent, or a certified copy thereof, and his authority to sell or barter the right so patented, and, at the same time, make a prescribed affidavit ; and if such clerk be satisfied that the right so intended to be sold or bartered has not been revoked or annulled, and that the applicant is duly empowered to sell the same within such county, etc., the clerk shall record the affidavit and letters patent, and give a certificate thereof.

The third section requires any person to whom such certificate may be issued to exhibit the same on demand.

The fourth section provides that there shall be written or printed in every promise or obligation in writing, the consideration of which, in whole or in part, shall be a patent right, the words, "given for a patent right ;" and all such obligations or promises, if transferred, shall be subject to all defenses, as if owned by the original promisee.

The fifth section imposes penalties for a failure to comply with the preceding sections.

The sixth section requires the payment of a fee of \$3 to the county clerk, for his services in taking proof.

The eighth clause of section 8, article 1 of the Constitution of the United States, confers authority upon Congress "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

The power thus conferred has been exercised by Congress since the organization of the government ; and, without undertaking to notice the various provisions of the statutes of the United States relating to the subject, it is sufficient to say these provisions fully

Hollida v. Hunt.

prescribe under what circumstances and in what manner patents shall be issued; how they may be transferred, and the character and extent of the rights invested in the patentee or his assignees.

When the patent is granted, the rights of the patentee are complete. He has then a property right in it, which cannot even be impaired by a subsequent repeal of the law under which it was granted. *McClurg v. Kingsland*, 1 How. 206.

“The monopoly granted to the patentee,” says TANNY, C. J., in *Gayler v. Wilder*, 10 How. 494, “is for one entire thing; it is the exclusive right of making, using, and vending to others to be used, the improvement he has invented, and for which the patent is granted. The monopoly did not exist at common law, and the right, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress, and no rights can be acquired under it unless authorized by statute, and in the manner the statute prescribes.”

The right to vend necessarily implies the power to do so wherever the jurisdiction of the authority conferring the right extends. To say that a right exists, yet it can only be exercised on such terms and conditions as may be imposed by an authority other than that conferring the right, necessarily concedes the supremacy of the latter.

It was said by MARSHALL, C. J., in *McCulloch v. The State of Maryland*, 4 Wheat. 426: “The great principle is, the Constitution, and the laws made in pursuance thereof, are supreme; that they control the constitutions and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries. * * * 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3d. That where this repugnance exists, that authority which is supreme must control, not yield, to that over which it is supreme.”

If this legislation can be sustained, upon the same principle nothing can be found to prevent the State from entirely prohibiting the sale of patent rights; and if this may be done here, it may also be done in every other State in the Union, and thus we would have the spectacle of a right granted under the laws of the

United States, pursuant to an express provision of the Constitution, annihilated by the laws of the several States.

It is conceded in the argument that the first, second and third sections of the act cannot be sustained; but it is insisted that the same objections do not exist against the fourth section, for, it is claimed, it is competent for the legislature to require that negotiable instruments shall express upon their face for what they are given, and to declare what shall be the legal effect of their assignment.

A majority of the court are of opinion that, while it is undoubtedly within the power of the legislature to prescribe the form and declare the effect of negotiable instruments, this section cannot be regarded as limited to this object. It has nothing to do with negotiable instruments in general, but is exclusively restricted to such as are given in whole or in part, for a patent right, and deprives them of one of the most important attributes of negotiability. It is a marked discrimination against the traffic in patent rights, which cannot fail to seriously prejudice and impair the rights of patentees and their assignees.

The right to vend, guaranteed by the general government to patentees, is to traffic and sell with the same freedom that may be exercised in regard to any and all other property, according to the common and usual course of trade and business, and whatever tends to prevent this, necessarily tends, to that extent, to destroy the right granted.

Such legislation is repugnant to, and inconsistent with, the powers exercised by Congress with regard to patent rights, and cannot be upheld. *McCulloch v. Maryland*, *supra*; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 id. 419; *Sinnot v. Davenport*, 22 How. 227; *Ward v. Maryland*, 12 Wall. 418; *Woodruff v. Parham*, 8 id. 130.

A similar enactment of the legislature of the State of Indiana was held, by the Circuit Court of the United States for that district, unconstitutional. The case was that of Major J. Robinson, *ex parte*, and the opinion was delivered by Mr. Justice DAVIS, of the Supreme Court of the United States. We quote from the opinion as published in 2 Bissell's Reports, 309. He said: "The property in inventions exists by virtue of the law of Congress, and no State has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of

Hollida v. Hunt.

Congress on the subject, he has a right to go into the open market, anywhere within the United States, and sell his property. If this were not so, it is easy to see that a State could impose terms which would result in a prohibition of the sales of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the Constitution."

From the views expressed, it is impossible to sustain the validity of either section of this statute. There was no error in sustaining the demurrer to the pleas.

The only other error assigned relates to the exclusion of evidence offered by appellant. The contract between the parties was reduced to writing. The evidence offered was for the purpose of proving, by parol, a different contract from that shown by the writing. This was inadmissible, and the court properly excluded the evidence.

The judgment is affirmed.

Judgment affirmed.

NOTE.—See *Helm v. First National Bank* (43 Ind. 167), 13 Am. Rep. 395; *Grover & Baker Sewing Machine Co. v. Butler* (53 Ind. 454), 21 Am. Rep. 200; *Patterson v. Commonwealth* (11 Bush. 311), 21 Am. Rep. 220.

In *Helm v. First National Bank*, the Supreme Court of Indiana held that a statute of that State requiring written obligations given for a patent right, to contain the words, "given for a patent right" was void for the same reasons set forth in the foregoing opinion.

In *Grover & Baker Sewing Machine Co. v. Butler* the same court held that a statute, requiring foreign corporations to comply with certain conditions, such as appointing an attorney, on whom process could be served, etc., before transacting business in the State, did not apply to corporations engaged in the manufacture and sale of articles covered by letters patent. This is an unwarrantable extension of the principle underlying the other cases.

In *Livingston v. Van Ingen*, 9 Johns. 582, Chancellor KENT said: "The power granted to Congress goes no further than to secure to the author or inventor a right of property, which, like every other species of property, must be used and enjoyed within each State according to the laws of such State. The power of Congress is only to ascertain and define the right of property; it does not extend to regulating the use of it. That must be exclusively of local cognizance. If the author's book or print contains matter injurious to public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains within the State to restrain the use of the patent right."

In the *Grover & Baker* case the law condemned was a general law, and uniform in its operations; besides this, it did not in any degree interfere with the sale or assignment of rights under letters patent, as did the other cases cited, but the interference if any, was limited to the sale of articles resulting

Hollida v. Hunt.

from the patented invention. This distinction is clearly pointed out in *Patterson v. Commonwealth*. Judge PAXON said: "There is manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. A State has no power to say, through its legislature, that the patentee shall not sell his patent, or that its use shall be common to all its citizens, for this would be in direct conflict with the law of Congress. * * * The discovery or invention is made property by reason of the patent, and his right of property the patentee can dispose of under the law of Congress, and no State legislation can deprive him of this right; but when the fruit of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of the State, it is subject to its laws like other property."

In that case the court held that a State statute providing for the inspection of illuminating oils and forbidding the sale of any that would not stand a prescribed test applied as well to patented oils as to others.

In *Cranston v. Smith*, 16 Alb. L. J. 830, the Supreme Court of Michigan decided that a statute of that State, requiring obligations given for patent rights to contain the words, "given for a patent right," and making them subject to defenses in the hands of innocent holders, the same as in the hands of the original payee, was an unconstitutional interference with the prerogative of Congress and void. The gist of the judgment is contained in the following extract from the opinion: "The subject of granting patents and regulating the rights of patentees has been placed by the Constitution of the United States in the control of Congress. It is for that body alone to determine to whom and on what conditions they shall be granted, and how the patented privileges are to be transferred or disposed of. Where any right or privilege is subject to the regulation of Congress, it is not competent for State laws to impose conditions which shall interfere with the rights or diminish their value. In those cases where the congressional power is lawfully exercised it is supreme. In the absence of any policy to the contrary, the transfer of such rights may follow, as it usually does, the State rule applicable to similar property as to sales or inheritances. But any attempt to discriminate against it is a direct invasion of the authority of the United States, and is invalid."

In *Ex parte Robinson*, 2 Biss. 309, a statute of Indiana similar to the first provision of that of Illinois was held void by the Circuit Court of the United States, on substantially the same ground. The opinion was delivered by Mr. Justice DAVIS, of the Supreme Court, and was a mere summary of the "conclusions" which he had reached. He said: "The property in inventions exists by virtue of the law of Congress, and no State has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market, anywhere within the United States, and sell his property. If this were not so, it is easy to see that a State could impose terms which would result in a prohibition of the sales of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the Constitution."

A statute of Ohio, similar to that of Michigan, was held void by the United States Circuit Court for the Southern District of Ohio, Mr. Justice SWAYNE, of the Supreme Court, presiding, in *Woolen v. Banker*, 6 Am. Law Rec. 233. Upon the trial of the action before a jury, Judge SWING held the law unconstitutional. A verdict was rendered in favor of the plaintiff, and a motion for a new trial was heard by Mr. Justice SWAYNE. The opinion is as follows:

Hollida v. Hunt.

SWAYNE, J. "The plaintiff brought his action upon a promissory note of \$500, containing the words, 'given for a patent right.' The defendant set up failure of consideration, for that the patent right was void for want of novelty, and of no value, relying upon the statute of Ohio, passed May 4, 1869, § 66, () L. 98, which provides that 'any note the consideration for which shall consist in whole or in part of the right to make, use or vend, any patent invention or inventions claimed to be patented, shall have the words 'given for a patent right' prominently and legibly written or printed on the face of such note above the signature, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder.'

"The reply sets up that the plaintiff's intestate purchased said note for value, without notice, before maturity.

"Upon a trial to a jury, the defendant offered evidence to show that when the note fell due, and demand was made, he offered to return the patent right and cancel the obligation. The court refused to admit the evidence, and defendant's counsel excepted. An exception was also taken to the refusal of the court to admit evidence that the patent was void for want of novelty, and of no value, and also to the charge of the court, because the jury were not instructed that the defendant was entitled to the same defenses against the plaintiff, although an innocent purchaser for value before maturity, as he would have against the original payee.

"These exceptions raise the question of the constitutionality of the statute of Ohio above quoted, and how much soever it may be disagreeable to this court to pronounce upon the unconstitutionality of a State statute before the Supreme Court of that State has done so, the merits of this case require such duty of us, and we cannot shrink from it.

"A construction has been given to the statute in one of its bearings by the Supreme Court of Ohio in the *State v. Peck*, 25 Ohio St. 29, in which the court say: 'To construe the phrases 'patent right, patented invention, and inventions claimed to be patented' as used in the act to mean machines manufactured under letters patent by the patentee or his assigns, would give to them not only an unusual, forced and unnatural import, but would seriously interfere with and injure the manufacturing interests and commercial prosperity of the State, which cannot be presumed to have been intended by the General Assembly in the passage of the Act.'

"That the Constitution of the United States has conferred upon the Congress the power 'To promote the progress of science and the useful arts, by securing, for limited time, to authors and inventors the exclusive right to their respective writings and discoveries' by § 8, art. 1, is no more certain than that such power has been exercised by the enactment of patent laws, and that no State can limit, control, or even exercise the power. Congress has not only regulated the manner in which a patent may be obtained, but it has prescribed the manner in which such right may be sold and conveyed, and has imposed the penalties for the infringement thereof. The national government has, therefore, made a patent right property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by any State, that will impair the right to make, use, or vend any patented article, or the right to assign the patent or any part of it, is forbidden by the highest organic law. The statute in question is such an interference, and is unconstitutional.

"We are supported in this opinion by every court that has had occasion to pass directly upon the question.

Happel v. Brethauer.

"DAVIS, J., *In re Robinson*, reported in 2 Bisl. 809, pronounced the Indiana law, similar in terms to the Ohio law, clearly unconstitutional.

"The Supreme Court of Indiana, in *Helm v. First National Bank*, 43 Ind. 167, held that as the Federal government has continuously, from the adoption of the Constitution down to the present time, legislated on the subject of patents, and as, from the nature and subject of the power, it cannot conveniently be exercised by the State, it must necessarily be exercised by the national government exclusively, and adds: 'We are of the opinion that the legislature of Indiana possessed no power to pass the statute under consideration, and it must, therefore, be held unconstitutional and void.'

"And so in *Hereth v. Merchants' National Bank*, 84 Ind. 890, it was held that a maker of a promissory note in the hands of an innocent purchaser for value before due, could not be heard to plead fraud, or failure of consideration, although 'given for a patent right' was in the body of the note, and that these words did not put the purchaser on his guard, or convey any notice whatever, being equivalent to 'value received.' And so in *Hascall v. Whitmore*, 19 Me. 162; *Smith v. Hiscock*, 14 Me.

"There is no error in rejecting the evidence offered, nor in refusing to charge the jury as requested. The decision of the court below is sustained, and judgment may be entered on the verdict. Leave to have the cause certified to the Supreme Court refused."—RMP.

HAPPEL, appellant, v. BRETHAUER.

(70 Ill. 100.)

Statute — impeachment of, by consent of parties.

The court will not act upon the admission of parties that a statute has not been passed in the manner required by the Constitution. Such fact must be shown either by the printed journals or the certificate of the secretary of State.

ACTION by Brethauer against Happel, before a justice of the peace. The demand indorsed on the justice's summons was \$200. It was contended that the justice had not jurisdiction to that amount, and that the act attempting to confer it upon him was void.

Adolph Moses, for appellant.

M. W. Robinson, for appellee.

THORNTON, J. The parties in this case stipulated that the "act to increase the jurisdiction of justices of the peace and police

Town of Lake View v. Rose Hill Cemetery Company.

magistrates " (Sess. Laws 1871-2, p. 548), and in force July 1, 1871, had not been passed in conformity with the requirements of the Constitution. No other proof was submitted, as to the admitted fact.

The court cannot act upon such evidence, in determining the constitutionality of a law. If such a rule was adopted, the entire statute might be abrogated by agreement.

We must take the law as we find it written in the statute. If the Constitution has not been complied with in its passage, this fact must be shown either by the printed journals, or the certificate of the secretary of State, the custodian of legislative proceedings. In no other mode can we be properly advised. The mode adopted in this case would be unsafe and ruinous to the stability of the statutes.

The judgment is affirmed.

Judgment affirmed.

TOWN OF LAKE VIEW v. ROSE HILL CEMETERY COMPANY.

(70 Ill. 191.)

Constitutional law — police power. limitation of — burial places

The charter of a cemetery company authorized it to acquire and use land not exceeding five hundred acres for burial purposes. After it had acquired the land and spent money in preparing and adorning the same, a statute was passed forbidding the company to use any of its lands for burial purposes outside of its then inclosure, which was less than five hundred acres. *Held*, that as it did not appear that any nuisance existed or was liable to arise, the statute was not a valid exercise of the "police power," and was unconstitutional. BREWER, C. J., SHELDON and CRAIG, JJ., dissenting.

BILL for an injunction. The opinion states the case.

Hitchcock, Dupes & Everts, Beckwith, Ayer and Kales, and Samuel W. Fuller, for appellant.

Trumbull, Anthony, Church and Trumbull, Barber & Lackner, and Van H. Higgins, for appellee.

SCOTT, J. This bill was filed by the town of Lake View to restrain the cemetery company from using certain lands owned by it since

Town of Lake View v. Rose Hill Cemetery Company.

1860, for the burial of the dead, in violation of the act of March 29, 1869. Appellee was created a corporation by the act of the 11th of February, 1859, with power to acquire, hold and use lands, not exceeding five hundred acres, in the town of Lake View, for cemetery purposes. The company was authorized by its charter to lay off and plat its grounds, to erect all necessary buildings, and to do all other acts that might be necessary to prepare them for the purposes intended. Its organization was completed and a part of the lands purchased were inclosed and platted, and large sums of money have been expended in beautifying and preparing the grounds. The lands are situated near the lake shore, about seven miles north of the court-house in the city of Chicago, and three or four miles north of the northern limits of the city. The town of Lake View contains about 8,400 acres of land and 1,500 inhabitants, but there are few dwellings near the cemetery.

In 1867 the corporate authorities of the town of Lake View passed an ordinance fixing the boundaries of the Rose Hill Cemetery, and its provisions were re-enacted by the act of the legislature, approved the 29th of March, 1869. The lands, which are the subject of this litigation, are situated outside of the limits, as fixed by the ordinance of the town and the act of the general assembly, and it is made unlawful for the company to use them for cemetery purposes, as by its charter previously granted it was authorized to do.

The validity of the legislation restricting the cemetery company from enlarging its grounds is the principal question in the case. While appellee claims its charter is in the nature of a contract that the State cannot rescind or impair, it is conceded the State has the power to control the use of its lands for burial purposes, so that its use may not injuriously affect the health of the community, but the right to prohibit the company altogether from its use for the objects designated in the charter is denied.

On the part of appellant, it is not denied the charter of appellee is a contract on the part of the State that the company may exercise the powers and privileges enumerated in the act of the general assembly, but it is insisted it must be understood to have been made with reference to the possible exercise of the rightful authority of the government, and that the prohibition contained in the act is a proper exercise of the police power of the State, the legislature being the sole judge of the exigency when this power shall be employed.

Town of Lake View v. Rose Hill Cemetery Company.

The decision turns upon the single question, whether the restriction imposed upon the company, as to the use of its land, as authorized by its charter, is a proper exercise of the police power of the State.

Without reference to the definitions given by law-writers and courts, of what is termed the police power of the State, in its more comprehensive sense, in its applications to the various relations of communities, when applied to matters like the subject of this litigation, it may be assumed that it is a power co-extensive with self-protection, and is not inaptly termed the "law of overruling necessity." It may be said to be that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society. It may be exercised to control the use of property of corporations as well as of private persons. In this regard there can be no distinction that can be justly taken. So far as franchises of a corporation are *publici juris*, it has always been held that the State may properly legislate touching them. Such legislation is not prohibited by that clause of the Constitution of the United States which forbids the passage of laws impairing the obligation of contracts, nor does it deprive such corporations of any of the substantial benefits intended to be conferred by the acts of incorporation. *The G. & C. U. R. R. Co. v. Loomis*, 13 Ill. 548; *Thorpe v. Rutland & Burlington R. R.*, 27 Vt. 140.

Mr. Cooley, in his work on Constitutional Limitations, states the doctrine thus broadly: "All contracts and all rights, it is held, are subject to this power, and regulations which affect them may not only be established by the State, but must also be subject to changes, from time to time, with reference to the well-being of the community, as circumstances change, or as experience demonstrates the necessity." Cooley on Limitations, 57.

As a general proposition, it may be stated, it is the province of the law-making power to determine when the exigency exists, calling into exercise this power. What are the subjects of its exercise is clearly a judicial question. There must necessarily be constitutional limitations upon this power. It is essential that such regulations must have reference to the comfort, safety or welfare of society, and, when applied to corporations, they must not be in conflict with any of the provisions of the charter. It is not lawful, under the pretense of police regulations, to take from a corporation any of the essential rights and privileges conferred by its

Town of Lake View v. Rose Hill Cemetery Company.

charter. Potter's Dwarries on Statutes, 458; Cooley on Const. Lim. 577. The right to control is essentially different, and rests on a different principle from the power to repeal, alter or amend charters of private corporations.

Burial places are indispensable. Convenient to the city of the living, a depository of the dead must be established and maintained. It concerns the public health, and if such places were not prepared by private enterprise, it would be the duty of the State to act in the premises. Among the most beneficent acts of government is that legislation which fosters such enterprises, and clothes an aggregate number of citizens with power to adorn and beautify grounds that shall receive the remains of our dead. The sentiments of our better natures, and the civilization of the age, demand that these sacred places shall be made attractive and beautiful by the employment of the highest skill in landscape culture, the erection of costly monumental structures and architectural adornings of elaborate design and workmanship. It is a part of the common history of the country, that, in the vicinity of large cities, where wealth and refinement abound, they are so arranged. They attract hither, as to pleasant places, lovers of the beautiful in nature, as to groves and parks that have been adorned by the lavish expenditure of money, and the works of those most skilled in that department of labor. Such a place is very far from being a nuisance *per se*, and the subject of absolute prohibition by legislative action. *The Town of Lake View v. Letz et al.*, 44 Ill. 81.

There is nothing in nature but may be the instrument of mischief, and the burial of the dead may be so done as to be most injurious in its consequences to the people in the vicinage. But that is not the question in the case at bar. By this act of the general assembly, it was intended to prohibit, absolutely, the use of the grounds by the company for burial purposes. The act of granting the charter was itself a legislative construction that a cemetery is not necessarily a nuisance, if the grounds are well selected, and interments made with proper care. That it might become so, through misconduct, no one doubts. The general assembly has the right to pass laws to regulate interments to prevent injury to the health of the community, and notwithstanding the company, in this instance, is exercising franchises conferred by the State, it is within legislative control in this regard.

There are now eight cemeteries within the limits of the town of

Town of Lake View v. Rose Hill Cemetery Company.

Lake View. The establishing of new ones may be the subject of prohibition, as is sought to be done by this act of the legislature. That question is not involved directly in the decision of this case.

The evidence does not show there were any cemeteries within the limits of the town at the date of the company's charter, and when it was organized. The power to establish and maintain a limited number of cemeteries in a given territory is a very different question from the right to establish an unprecedented number, that would cover the whole face of the country with burial places. The prohibition of the latter may be within the rightful exercise of the police power, and the other not. The one is an absolute necessity, and the other might impose unreasonable burdens on a single community.

In the case at bar, by the provisions of its charter, the company was authorized to buy and hold land not exceeding a certain quantity and to use it for cemetery purposes. This it can rightfully do, and while the State has the unquestionable power to regulate the manner of its use, so far as it may injuriously affect others, it cannot, under the pretense of making police regulations, repeal its charter and revoke its franchises, or deprive the company of any of the essential rights conferred by its charter.

The act of the legislature does not profess to correct any abuses in the use of the property, but is an arbitrary prohibition of its use in accordance with the provisions of a charter previously granted. Upon what principle can such a law be maintained, or what "overruling necessity" was there for its enactment? There is no pretense the cemetery, as constructed, is a nuisance, nor is there any charge that the health or comfort of the people in the vicinity has been or will be affected in the near or even in the distant future. If it can be maintained at all, it must be by some absolute power by which the general assembly, it being the sole judge of the extent of its powers, may declare what shall and what shall not be, independently of all constitutional restrictions. Reference is made to the reserved power of the State denominated "police power," as affording the requisite authority. It has been said the source of this extraordinary power may be readily recognized as flowing from the people in their organized capacity, inalienable in its character, but that it is difficult to define its boundaries or limit its operations. We are unwilling, however, to concede the existence of an

Town of Lake View v. Rose Hill Cemetery Company.

indefinable power, superior to the Constitution, that may be invoked whenever the legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use without compensation, whether such property consists of franchises or tangible forms of property. The Constitution expressly provides the right of property shall remain inviolate, and, upon all enumerated subjects, it must constitute a limitation on the exercise of all power, no matter what its nature may be, nor whence its origin. If such was not the case, there could be no constitutional security for private rights, and the citizen would hold his property, corporeal and incorporeal, by a most uncertain tenure.

In this instance, if the general assembly can rightfully prohibit the company from using its lands previously purchased which lie outside of the present inclosure, for cemetery purposes, as authorized by its charter, upon the same principle it could prohibit the use of the now unoccupied portion of the inclosure, and as the property is valueless to it for any other purpose, and as the company could not lawfully use it, in any event, for other than burial purposes, it would amount to a deprivation of its use, and almost a total destruction of its value. The franchises conferred by the act of incorporation would be rendered valueless, unless they could be employed in the use of the lands previously purchased, and the capital invested in them would be imperiled, if not wholly lost.

It is not denied that the lands of this company are well selected, and are situated at a proper distance from the populous part of the city, in a sparsely-settled community, there being but few dwellings in the immediate vicinity. If these lands cannot be used, a very grave question would arise—where could the city find a burial place for its dead? The same power that prohibits the use of these grounds would extend to all places within the jurisdiction of the State. We cannot assent to the proposition that the general assembly possesses any such power.

Under the power to regulate, the State cannot deprive the citizen of the lawful use of his property, if it does not injuriously affect or endanger others. Among the beneficent provisions of Magna Charta is the protection guaranteed the subject in the free enjoyment of his life, liberty and property, except as the same might be declared forfeited by the judgment of his peers or the law of the land. This cardinal principle has been embodied in the Constitutions of all the American States, and by a recent amendment, it is now

Boggs v. Willard.

incorporated in the Federal Constitution. In view of this constitutional guaranty, it cannot be said that every legislative enactment that affects the interest of the citizen is necessarily the "law of the land." Such a construction would render nugatory every constitutional provision intended for the protection of private property.

If a person is to be deprived of his private property, it must be by the exercise of the right of eminent domain, and in all such cases just compensation must be made.

We are of opinion this act, so far as it limits the boundaries of Rose Hill Cemetery in the use of lands previously owned, not exceeding 500 acres, for the purposes named in the charter, is an unconstitutional exercise of power, and cannot be maintained.

The bill was properly dismissed, and the decree must be affirmed.

Decree affirmed.

SHELDON, J., delivered a dissenting opinion, with which BRESEN, C. J., and CRAIG, J., concurred.

Boggs v. WILLARD.

(70 Ill. 315.)

Removal of suit to United States courts — final disposition of cause.

Where a decree of the trial court is reversed on appeal and the cause remanded with direction to dismiss the bill, the cause is finally disposed of, and it cannot, thereafter, be removed into the Circuit Court of the United States. (*See note, p. 79.*)

A PPEAL from a decree refusing a motion to transfer a cause to the Circuit Court of the United States.

Writ of error to the Superior Court of Cook county.

Isham & Lincoln, for plaintiff in error.

Goudy & Chandler, for defendants in error.

WALKER, J. This case was before this court at the September term, 1870, and is reported in 56 Ill. 163. The facts relating to the claims of the parties are contained in the opinion there re-

ported, to which reference is made. The decree of the court below was then reversed, and the cause remanded with directions to dismiss complainant's bill.

When the case was re-docketed in the Superior Court, where it had been tried, and from which the appeal had been prosecuted, complainant filed a petition, under the acts of Congress, to have the cause transferred to the Circuit Court of the United States for the Northern District of Illinois, but the court refused the motion and dismissed the bill. To reverse that decree, complainant prosecutes error. The grounds of reversal urged are, that the court below should have granted the petition, and transferred the cause, and that the bill should not have been dismissed.

Under the first assignment of errors, it is contended that the case comes within the law of Congress, as the order of dismissal had not been entered. The proceeding seems to be based on the act of the 2d of March, 1867. (Sess. Laws, p. 196.) It provides that, where a suit is pending in a State court, in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, and the matter in dispute exceeds \$500, exclusive of costs, the non-resident citizen may file the required petition, with the proper affidavit, and offer good and sufficient security for the prosecution of the suit, etc., at any time before the final hearing or trial of the suit, and have it transferred to the next term of the Circuit Court of the United States, and the State court is prohibited from proceeding further with the case. Was this suit pending, and had there been no final hearing or trial when the application was made, within the meaning of the law?

In numerous cases, it has been held, in this State, that, where a case has been tried in this court, and remanded with specific directions to dismiss the bill, or to do some other act, the court below has no power to do any thing but carry out the specific directions. *Chickering v. Failes*, 29 Ill. 294; *Winchester v. Grosvenor*, 48 id. 515; *Hollowbush v. McConnel*, 12 id. 203. The statute (R. S. 1845, p. 420) empowers this court to give final judgment and issue execution, or remand the cause that execution may issue, or that other proceedings may be had thereon. Had we, in the case, when it was before us, rendered a final decree dismissing the bill, no one would have claimed that the suit was pending thereafter, or that there had not been a final hearing or trial. And why? Because

Boggs v. Willard.

this court had considered the evidence as applied to the pleadings, and had fully determined the rights of the parties as presented by the case. And in what does the decree rendered in this court differ from a decree of dismissal? We, after fully considering the pleadings and evidence, decided that the complainant had not shown a right to the relief sought, and that the court below erred in not dismissing the bill, and then reversed the decree, and remanded the cause for further proceedings in conformity with the opinion. Under such specific directions, the court below could only act in conformity with the opinion, and dismiss the bill. All the questions had been finally heard, tried and decided on the appeal in this court. If the decree of this court did not finally determine the case and all of its parts, it is impossible for us to comprehend how a case can be finally heard and tried. To maintain this writ, or to permit other and further proceedings than those directed by this court, would be to hold that controversies could never be ended by judicial sentence or decree. The cause, then, having been finally heard and tried, and only remanded that the court below might dismiss the bill, and issue execution for costs, from that court, instead of this, we have no hesitation in saying that the court below could not have done otherwise than deny the petition and dismiss the bill.

As to the second assignment of error, it is only necessary to say, that the court below conformed its action strictly to the mandate of this court, and if its action was erroneous, it was because we had erred in deciding the case and finally determining the rights of the parties. It is, in effect, assigning an error on the decision of this court. This cannot be done, so as to reach a reconsideration of the case as formerly presented to this court. That can only be done on a rehearing granted on petition on the spontaneous action of the court. But the grounds upon which the case was decided by us we regard as the settled law of this court. It was announced in *Mixer v. Sibley*, 53 Ill. 77, which was finally decided on a rehearing, and has been followed in other cases.

The decree of the court below, dismissing the bill, is affirmed.

Decree affirmed.

NOTE.—The same rule was held in the same case by the United States Circuit Court. *Boggs v. Willard*, 8 Bias. 256. But where the State court has ordered a new trial, the plaintiff may dismiss and commence in the Federal court. *Harard v. Chicago, etc., R. R. Co.*, 4 Bias. 452.

Hadden v. Knickerbocker.

"Although," says Judge DILLON, in his "Removal of Causes" (p. 54), "there is some conflict between the State and Federal courts on the point, yet the weight of the cases and the authoritative view is, that if the trial court has wholly set aside a verdict and granted a new trial, or if the State Appellate Court has wholly reversed the judgment and remanded the case to the court of original jurisdiction for a trial *de novo*, then, in either event, it is not too late, under the act of 1866 or 1867, to apply to remove the cause, as it is in the same posture as before the first trial or hearing was had." The following cases are cited: *Vannevar v. Bryant*, 21 Wall. 41, 43, per WATTE, C. J.; S. C., 106 Mass. 180; *Stevenson v. Williams*, 19 Wall. 572; *Waggener v. Cheek*, 2 Dillon, 560; *Kellogg v. Hughes*, 3 id. 357; *Dart v. McKinney*, 9 Blatchf. 359; *Johnson v. Monnell* (change of residence pending suit), 1 Woolw. 390; *Minnett v. Milwaukee & St. Paul Railway Co.*, 3 Dillon, 460, denying *Galpin v. Critchlow*, 18 Am. Law Reg. (N. S.) 187; S. C., 112 Mass. 339, and *Whittier v. Hartford Ins. Co.*, 20 Am. Rep. 185; S. C., 55 N. H. 141; see *Ins. Co. v. Dunn*, 19 Wall. 214, 225; *Akerly v. Vilas*, 1 Abb. U. S. Rep. 284; S. C., 3 Bias. 110; *Murray v. Justices*, 9 Wall. 274; *Fasnacht v. Frank*, 23 id. 416; *Dart v. Walker*, 4 Daly (N. Y.), 188 (1871), also holding that under act of 1866 or 1867 removal may be had after a reversal and order for a new trial.

The following State courts hold a different doctrine: *Hall v. Ricketts*, 9 Barb. 366; *Akerly v. Vilas* (24 Wis. 165), 1 Am. Rep. 163; *Home Life Ins. Co. v. Dunn* (20 Ohio St. 175), 5 id. 642; *Crane v. Reeder* (26 Mich. 537), 15 id. 233; *Galpin v. Critchlow*, 112 Mass. 339.—RMP.

HADDEN V. KNICKERBOCKER.

(70 Ill. 677.)

Landlord and tenant — Lien of landlord for rent.

One who purchases of a tenant property, other than crops, and removes the same from the leased premises, takes it freed from the lien of the landlord for rent, even if he knew, at the time of the purchase, that the tenant owed rent and that the landlord was about to distrain therefor.

ACTION of replevin. The opinion states the facts.

S. W. Brown, for appellants.

Wheaton & Smith, for appellees.

SCOTT, J. The facts of this case may be briefly stated:

Dudley Randall was a tenant of appellant Hadden, and was in arrear for rent of premises occupied by him. The landlord issued his warrant, and placed it in the hands of Graves, to be executed.

Hadden v. Knickerbocker.

After the warrant was issued, but before it was levied, appellees claim to have purchased the property in controversy of Randall for a pre-existing indebtedness, and to have taken the same into their possession. It is conceded the property was in possession of appellees when the levy was made under the distress warrant. It was taken out of their possession, and this suit was commenced in replevin to recover it.

While there is some conflict in the evidence, the jury were justified in finding that appellees were *bona fide* purchasers of the property involved in this litigation. The jury also found, by special verdict, that neither of the appellees, at the time of the alleged transfer of the property, had notice that Randall owed Hadden for rent, or that he was about to distrain for the same.

The record presents the direct question, whether the landlord had a lien upon the property after it had been removed from the demised premises, which he could enforce against *bona fide* purchasers.

At common law, a distress for rent had to be made upon the demised premises, and the right of the landlord to distrain terminated with the removal of the goods. If any remedy remained, it was by action. Even the goods of a stranger, if found upon the demised premises, might be seized. In this respect the common law has been enlarged and modified by the provisions of our statute. By our laws the landlord may distrain the goods of the tenant anywhere the same may be found in the county where the demised premises are situated, but not the goods of the stranger, although found on the premises. This provision of the statute, however, has exclusive reference to the property of the tenant. Laws enlarging the common-law remedy by distress have always been construed strictly. Hence, this statute cannot be so construed as to authorize the landlord to distrain property in the hands of a stranger, although he may have purchased it of the tenant.

The lien of the landlord was superior to all junior liens, so long as the property remained upon the premises occupied by the tenant, but could not prevail against prior liens or over the rights of *bona fide* purchasers after the property had been removed. We do not understand our statute has changed the common law in this respect, or given the landlord any greater or different lien, except in the case of crops growing on the premises. A lien is expressly given the landlord, by statute, upon crops growing or grown upon

Hadden v. Knickerbocker.

the demised premises, in any year, for the rent that shall accrue during the current year. (R. S. 1845, p. 335, § 8.) But no specific lien is created or given as to other property of the tenant.

In the case at bar, the property purchased had been removed from the demised premises prior to the levy of the distress warrant. Appellees were *bona fide* purchasers, for a valuable consideration. Their right to hold the property is not affected by the fact they may have known that rent was due the lessor, and that he was about to distrain. The property had been sold and removed by the consent of the tenant, and the right to distrain did not exist, either at common law or by any provisions of our statute. If the transaction had been fraudulent, it seems the landlord might follow the property, but not otherwise. Taylor on Landlord and Tenant, § 576.

In *Bach v. Meats*, 5 Maule and Selw. 200, it was held, a creditor may, with the assent of his debtor, take possession of goods and remove them from the premises, for the purpose of satisfying a *bona fide* debt, without incurring the penalty of the statute, 11 Geo. II, c. 19, § 3, against persons assisting the tenant in removing his goods from the premises, and this notwithstanding his knowledge that rent was due, and an apprehension the landlord was about to distrain.

The same principle was recognized in *Martin v. Black*, 9 Paige, 641, and in *Coles v. Marquand*, 2 Hill, 447.

In *Hastings v. Belknap*, 1 Denio, 190, it was declared, where a tenant assigns his goods to provide for the payment of *bona fide* debts, and the goods are removed from the demised premises, the right to distrain is at an end, although the creditors had notice that rent was about to become due. See, also, Taylor on Landlord and Tenant, 577.

The case of *O'Hara v. Jones*, 46 Ill. 288, cited by counsel for appellant with so much confidence, is clearly distinguishable from the case at bar. There, the goods were assigned to pay the debts of the tenant, and had not been removed from the demised premises prior to the distress. It was held, the assignee was a trustee and not a *bona fide* purchaser. Not being such, he took the property under the assignment, and held it subject to all the burdens it was under in the hands of the assignor. The assignee was himself, for the time being, a tenant of the premises. The same doctrine is announced in *Martin v. Black*, *supra*.

Anderson v. Warne.

No material error is perceived in the instructions given for appellees. Those asked on behalf of appellants do not state the law correctly, hence they were properly refused.

For the reasons indicated, the judgment is affirmed.

Judgment affirmed.

ANDERSON, appellant, v. WARNE.

(71 Ill. 20.)

Negotiable instrument — fraud between maker and surety — when payee not affected by.

In an action by the payee of a promissory note against the surety thereon, the latter interposed the defense that he was induced to sign the note by the fraud and circumvention of the maker. *Held*, not a good defense without proof that the payee participated in or was cognizant of the fraud.

ACTION by Warne against Anderson and one Brusher on a promissory note, executed by Brusher as principal, and by Anderson as surety. There was no service on Brusher. Judgment below for plaintiff.

Mayborne & Brown, for appellant.

A. M. Herrington, for appellee.

SCOTT, J. The note which is the foundation of this action was made by plaintiff in error and Paul Brusher, and by its terms was payable to defendant in error. It is sought to avoid the payment, on the ground the note was obtained by fraud and circumvention. This defense cannot be maintained. The wrongful conduct shown was between the makers, and was not participated in by the payee. He was guilty of no fraudulent practices whatever. Brusher applied to him for the loan of \$100, and proposed to give Gunner Anderson as security. At first the proposition was declined, but on further entreaty it was agreed he would give Brusher \$96 for his note for \$100, payable in ninety days, with Anderson as security. The note was procured, and the money paid over to Brusher. The payee had no reason to suspect it was not a fair transaction. There was nothing in the circumstances even to

excite suspicion in the mind of any one, however careful. He had seen Brusher but a few days before, at Anderson's house, when Anderson had spoken of him as his friend, and inquired if he did not recollect him. Defendant in error had had frequent small business transactions with Brusher, and there was nothing unusual in offering to sell the note in controversy.

It is claimed plaintiff in error was deceived into signing the note; that Brusher represented to him it was an "identity paper," to enable him to procure his bounty money from defendant in error.

It is difficult to reconcile this theory of defense with good faith. Plaintiff in error knew Warne and Brusher were personally acquainted, and had previously had business transactions together. How he could have been deceived by the pretense that Brusher wanted an "identity paper," to present to a man with whom he was well acquainted, is not explained by any evidence. But if it be conceded Brusher was guilty of fraudulent practices in procuring the execution of the note, and that he obtained its execution under the belief it was an "identity paper," this fact would not change the decision. There was no fraud on the part of the payee, and his rights cannot be affected by any fraud practiced between the makers of the note. The statute only renders the note void when the payee commits, procures, or has knowledge of the fraud before he receives the instrument. He must have participated in the wrongful conduct. Where the payee is free from all fraud or participation in procuring the execution of the instrument, he cannot be held responsible for the wrong inflicted, but it is otherwise when he is, by any means, a party to it. *Easter v. Minard*, 26 Ill. 494; *Young v. Ward*, 21 id. 223.

The evidence shows plaintiff in error was himself guilty of negligence, and hence must bear the consequences resulting from his conduct. The rule of law is, where one or two persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur must bear it. It is his duty to use reasonable and ordinary precaution to avoid imposition, for it is against reason that a party who stands fair should suffer for the negligent conduct of another. *Leach v. Nichols*, 55 Ill. 273; *Harvey v. Smith*, id. 224; *Taylor v. Atchison*, 54 id. 196; S. O., 4 Am. Rep. 118; *Mead v. Munson*, 60 Ill. 49.

The note was written in English, and plaintiff in error claims that neither he nor his wife, who were the only persons present

Warnecke v. Lemboa.

except Brusher, could read it. The proof shows his daughter, who was a member of his family, could read English. She was temporarily absent, only a half mile distant. He ought to have awaited her return, which would have been but a short time, and had the instrument read before he signed it, and it was negligence not to do so.

The instructions given for defendant in error were substantially correct, and were such as the nature of the case required. Those refused stated the law differently from what we hold it to be, and for that reason were properly refused.

No error appearing in the record, the judgment is affirmed.

Judgment affirmed.

MCALLISTER, J. I concur in the opinion of the majority of the court, so far as the decision goes upon the ground of negligence in the maker, but hold that if a person obtained the execution of a note by fraud and circumvention in such execution, the circumstance that the name of another person is inserted as payee, who did not participate in the fraud, does not deprive the maker of the right to set up the fraud and circumvention as against such payee. Any instrument obtained by fraud and circumvention in the execution, without negligence on the part of the maker of it, is void at common law, whenever or howsoever the question may arise, and I think our statute subjects negotiable instruments to the same rule.

SHELDON, J. I concur with Mr. JUSTICE MCALLISTER.

WARNECKE, appellant, v. LEMBOA.

(71 Ill. 91.)

Trust — power. “Legal representative.”

A deed of trust gave a power to the trustee “or his legal representative,” to sell the property conveyed by the deed on default of payment of the debts for which it was conveyed as security. *Held*, that the power could not be exercised by the administrator of the trustee but only by his successor in the trust.

BILL in chancery by Lembca against Warnecke and others to redeem certain real estate from a sale under a trust deed. The opinion states the necessary facts. The court below granted the relief.

R. H. Forrester, for appellant.

Barber & Lackner, for appellee.

Scott, J. This bill was to redeem the land in controversy from a sale made under a trust deed, for default in the payment of the indebtedness thereby secured. The trustee named in the deed, who was clothed with the power to make the sale, having died, the sale was made by Walburga Rauscher, his widow and the administratrix of his estate. It was provided in the trust deed, in default of the payment of the notes secured, or any part thereof, on application of the legal holder "John Rauscher, or his legal representative;" should advertise, sell and convey the land as the attorney of the grantor.

The only question presented material to the decision of the case is, whether the administratrix of the deceased trustee could rightfully make the sale.

The law is very jealous of this class of sales, and will permit no marked deviation from the authority giving the right. *Mason v. Ainsworth*, 58 Ill. 163.

The general rule is, the trustee must himself execute the power, and if, by reason of death or incapacity, he cannot do it, relief can only be had on application to a court of chancery to appoint a trustee to execute the residue of the power.

It is claimed the "legal representative" of the trustee is designated, by the express terms of the deed, to make the sale on the application of the legal holder of the indebtedness. Who is the "legal representative," in the sense that term is used in the trust deed, is a question involving very grave difficulty. It is well known this term does not always have the same signification. Legal representative, or personal representative in the commonly accepted sense, means administrator or executor. But this is not the only definition. It may mean heirs, next of kin or descendants. 2 Redfield on Wills, 78, 80, 81; *Delannay v. Burnett*, 4 Gill, 454; *Grand Gulf Railroad and Banking Co. v. Brayan*, 8 S. & M. 234.

The sense in which the term is to be understood depends some-

what upon the intention of the parties using it, and is to be gathered, not always from the instrument itself, but as well from the attending circumstances. It will be observed these definitions of "legal representative" have reference exclusively to administration of estates, both testate and intestate, and the relation certain parties bear to deceased persons. It seems to us most illogical to say the term "legal representative," as used in the deed, comes within any of the definitions given. It will bear another construction, and one more in harmony with the intention of the parties using it. When found in instruments other than those relating to the administration of estates or the affairs of the deceased persons, it has been construed sometimes to mean assignees, or a certain class of purchasers, accordingly as it was supposed the parties must have understood it.

Nothing could be more absurd than to suppose the grantor, in this instance, intended to use it in the sense of heirs or next of kin. They might be so numerous, or there might be minors, lunatic, insane, or persons otherwise incapacitated to act, and it would be impracticable to have any execution of the power. Nor is it more reasonable to believe it was intended to use the term in the sense of administrator or executor. The administrator or executor is the legal representative of the decedent only as to the personal estate.

The legal title to the real estate covered by the trust deed was in the trustee. It did not descend to the administratrix, and how could she convey that which she did not have? She was in no way connected with the title that was in the trustee, but was a stranger to it. She could not convey in the name of the trustee, for he was dead; nor could she convey in the name of the grantor, or her own name, for no such power was given. Where the trustees have the legal title and power of sale, they alone are competent to contract and make a good title to the purchaser. Perry on Trusts, § 787.

In *Delannay v. Burnett, supra*, it was declared the purchaser of a pre-emption right is to be regarded as the "legal representative" of the original claimant, under the act of Congress granting such rights.

In the *Grand Gulf Railroad and Banking Co. v. Brayan, supra*, the same point was ruled, that the term "legal representative," as used in the act of Congress of March, 1808, touching pre-emption

claims under the act, does not mean children or heirs only, it embraces also assignees and grantees, who, in regard to the thing assigned or granted, are the legal representatives of the assignor or grantor. The reasoning of the court is cogent and unanswerable. Mr. Chief Justice SHARKEY, in delivering the opinion, said: "An assignee or grantee is a legal representative of the assignor or grantor in regard to the thing granted. If Congress had intended that heirs, only, should be entitled to represent the original settler, it is remarkable that the word 'heirs' was not used. Its meaning is well known; it is the appropriate expression, when those on whom the law casts the estate are spoken of. And as Congress used a phrase more comprehensive, we must suppose other persons besides heirs were intended. General expressions in law must be construed to have a general application, unless there be a clear indication that they were intended to be used in a restricted sense. Representative is one who exercises power derived from another. The purchaser derives his power over the estate from his vendor."

Had it been the intention of the parties to this deed that the heirs or administrator should execute the power in the event of the death of the trustee, it is a singular omission that no appropriate words were used to indicate which class of representatives was meant. And as the parties have used a term susceptible of a different definition, we must believe persons other than heirs or administrators were intended, especially when the enlarged interpretation will effectuate the purpose the parties had in view, and a more restricted and technical one will defeat it.

It is agreeable to the analogies of the law that the assignee or grantee having the legal title that was in the trustee can execute the power, but it involves an absurdity to say a mere stranger to the title can. This is the doctrine of the cases of *Pardee v. Lindley*, 31 Ill. 174, and *Strother v. Law*, 54 Ill. 413. The principle of those cases is, that, where the mortgagee or his assignee is empowered to sell on default being made, if the indebtedness thereby secured is assignable at common law, or by our statute, the assignee is the only party who can execute the power. It is for the reason the assignee is the legal holder of the indebtedness, and the assignment carried with it the mortgage as the mere incident.

In *Hamilton v. Lubukee*, 51 Ill. 415, and in *Mason v. Ainsworth*, *supra*, it was declared the equitable assignee of the indebtedness

Holder v. Lafayette, Bloomington and Mississippi Railway Company.

could not execute the power in his own name. He had neither the legal title to the estate mortgaged, nor the indebtedness. In the case we are considering the administratrix had neither. It follows, from the doctrine of those cases, that the party in whom is the legal title to the mortgaged property, or his assignee, or his grantee, is the only proper party to execute the power.

Here, the trustee was dead. There was no grantee or assignee, and hence no "legal representative," in the sense we suppose that term must have been used in the deed. Therefore, there was no one who could rightfully make the sale. A new trustee should have been appointed to execute the power, or the trust deed should have been foreclosed by bill in chancery as an ordinary mortgage.

The sale by the administratrix, being unauthorized by law, did not bar the equity of redemption.

The court properly held the premises subject to redemption, and its decree is affirmed.

Decree affirmed.

BRESE, C. J. I do not concur in this opinion. The deed of trust expressly authorizing the legal representative to make the sale, it was properly made by the administratrix.

SHELDON, J. I concur with Mr. Chief Justice **BRESE**.

HOLDER, appellant, v. LAFAYETTE, BLOOMINGTON AND MISSISSIPPI RAILWAY COMPANY.

(71 Ill. 100.)

Corporation — right of officers to compensation.

Where one of the directors of a corporation is elected treasurer by the board of directors, he is not entitled to compensation for services rendered as treasurer, unless the compensation has been fixed by a by-law or resolution before the services were performed.

Subs. that if a stockholder or other person not connected with the directory perform the duties of treasurer the rule will not apply.

ACTION for money. The opinion states the case.

Spencer & Reeves, for appellant.

VOL. XXII. — 12

Holder v. Lafayette, Bloomington and Mississippi Railway Company.

L. E. Payson, for appellee.

WALKER, J. In 1867 appellant was elected by the board of directors, treasurer of the company. He was, at the time, one of the directors. The board never fixed any salary, fees or compensation of the treasurer. He acted from the 1st day of September, 1867, until the 31st day of January, 1872, when he settled with the company, and they allowed him for his services as treasurer during that time, the sum of \$4,000, and drew a warrant in his favor for that sum on the treasury of the company. A warrant of attorney was given by the company, and a judgment was subsequently confessed for that amount, in favor of appellant, but, on motion, it was set aside and the company let in to plead, and on the trial, by consent of parties, by the court without a jury, the issues were found for the defendant, and a judgment rendered accordingly, from which plaintiff appeals to this court.

According to the rule announced in the case of *Cheaney v. The Lafayette, Bloomington and Mississippi Railway Co.*, 68 Ill. 570; S. O., 18 Am. Rep. 584, the question is, whether the services thus rendered were extraordinary and entirely disconnected from the duties devolved upon him as a director. The board of directors were in the possession of the funds and property of the corporation, and that body had entire control over it, and could disburse it as they chose, either by themselves, by one or more of their number, or by some other person not of the board of directors. Having done so through one of their members, we must suppose that they chose to regard it as a part of his duty as director. Had not such been the intention, it seems to us that a salary would have been provided by a by-law or resolution.

Again, they are managing a fund as trustees for the stockholders, and they have no right to use or appropriate the funds of their *cestuis que trust* to themselves. They have no power to waste, destroy, give away or misapply it, and when they were elected by the shareholders, no provision having been made for their compensation, the stockholders had a right to suppose they were acting under the common-law rule, that, as trustees, they could not claim payment for their services. But it is said there was an understanding, when appellant agreed to act as treasurer, that he should receive a fair compensation. With whom was it so understood? Was it with the shareholders who owned the money and property with the manage-

Dewey v. Warriner.

ment of which he and his fellow-directors had been intrusted, or was it with themselves?

The Supreme Court of Pennsylvania, in the case of *Kilpatrick v. The Penrose Ferry Bridge Co.*, 49 Penn. St. 118, held that a treasurer of such a company could not recover compensation for services rendered unless the compensation had been previously fixed by a by-law or a resolution before the services were performed. See, also, *Loan Association v. Stonemetz*, 29 Penn. St. 534; *New York and N. H. Railroad Co. v. Ketchum*, 27 Conn. 170; *Henry v. Rutland and B. Railroad Co.*, 27 Vt. 435; *Butts v. Wood*, 37 N. Y. 317.

We are not disposed to adopt the rule in its entire length and breadth, but to limit it to officers who have the management and control of the property and affairs of the company. Where the office of treasurer, secretary or attorney, etc., is held by a mere stockholder, or other person not connected with the directory, the rule should not apply, as they are wholly disconnected from the management and disposal of the property, and are not tempted to misapply the funds, or when they perform duties disconnected from their office, and no rule of public policy is thereby violated.

But in this case appellant was a director when he performed the duties of treasurer, and falls within the rule. See *Gridley v. The Lafayette, Bloomington and Mississippi Ry. Co.*, 71 Ill. 200.

The judgment of the court below must be affirmed.

Judgment affirmed.

SCOTT, J. I do not concur in this decision.

DEWEY, appellant, v. WARRINER.

(71 Ill. 193.)

Negotiable instrument — indorser of, cannot impeach — witness.

The indorser of negotiable paper is not a competent witness to impeach its consideration. (See note, p. 98.)

ACTION of assumpsit, by Warriner against Dewey, upon a bill of exchange drawn by the defendant, in his own favor, upon one McLean, and indorsed to plaintiff. The plaintiff had judgment in the court below, and defendant appealed.

Crawford & Marshall, for appellant.

Blanchard & Silver, for appellee.

CRAIG, J. The main question presented by this record, as we view it, for consideration, is this : Is the indorser of negotiable paper a competent witness to impeach its consideration ?

On the trial in the Circuit Court, on application of the plaintiff, the court excluded all the evidence of Dedrick, who was an indorser of the bill of exchange, that showed or tended to show a want of consideration of the draft, from the jury. The court also refused to permit Dewey, who was also an indorser of the draft, to testify what the original consideration of the draft was.

In this we perceive no error. We are aware that on this question the authorities are not uniform in the different States, but this court has several times held, and it may be regarded as well settled in this State, that an indorser of negotiable paper, having given it the sanction of his own name, shall not be permitted, by his own testimony, to impeach the consideration of it. *Walters v. Smith*, 23 Ill. 342 ; *Walters v. Witherell*, 43 id. 388.

The weight of authority in the States is in harmony with this doctrine, and it is fully sustained by the Supreme Court of the United States. *The Bank of United States v. Dunn*, 6 Pet. 51.

The reason of the rule is not on account of the interest the indorser may have in the event of the suit, but it proceeds upon the ground of public policy. It is contrary to every principle of justice as well as public policy, to permit a party to give credit to negotiable paper, by his indorsement, and then, in turn, defeat it by his own evidence.

Neither can the fact that Dewey was the maker, as well as indorser, change the rule as to his evidence. He was, nevertheless, indorser, and on that account, although he sustained other relations to the paper, his evidence was properly excluded.

No other witnesses were offered by the defendant to impeach the consideration of the bill of exchange. That defense was not established on the trial. It was, therefore, not error in the court to refuse defendant's 4th, 5th, 6th and 7th instructions, as they are drawn on the theory that there was no consideration for the draft, and upon this point there was no evidence before the jury on which to predicate the instructions.

The court properly refused defendant's 8th and 9th instructions

Dewey v. Warriner.

They are based upon the hypothesis that there was evidence before the jury that the draft had been altered, and hence was not the draft of defendant, and that an issue of that character had been formed, and was for trial by the jury.

The only plea filed by defendant was, the general issue, *not sworn to*, with notice, in writing, of special matters relied upon as a defense.

The same section of the statute which authorizes a plea of the general issue with notice, to be filed, declares, no person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, unless the person so denying the same shall, if defendant, verify his plea by affidavit. Gross' Statutes, page 511, § 21.

Had the defendant desired to present to the jury the question of the alteration of the draft by evidence and instructions, he should have filed the proper plea sworn to. That issue did not and could not arise on a plea of general issue, with notice of special matters, in writing. *Hunt et al. v. Weir*, 29 Ill. 83.

We perceive no error in the modification of defendant's third instruction, or in the giving of plaintiff's instructions.

Upon the issue formed, the case seems to have been fairly presented to the jury, both as to the law and the fact, and we see no reason for disturbing the judgment. It will, therefore, be affirmed.

Judgment affirmed.

NOTE. — That an indorser of negotiable security indorsed before it was due is not admissible to impeach its original validity, was held by Lord MANSFIELD in the case of *Walton v. Shelley*, 1 T. R. 296, and was adhered to in *Hart v. McIntosh*, 1 Esp. 298. But this doctrine has been overruled in England, and the indorser or other party held competent to prove any fact to which any other witness would be competent to testify. *Jordaine v. Lashbrooke*, 7 T. R. 601; 1 Phil. Evid. 89. And several of the American States hold the indorser admissible. In New York, *Stafford v. Rice*, 5 Cow. 23; *Bank of Utica v. Hillard*, 8 id. 153; *Williams v. Walbridge*, 3 Wend. 415. In New Jersey, *Freeman v. Brittin*, 2 Harr. 191. In Maryland, *Ringgold v. Tyson*, 3 Harris & J. 172; *Hunt v. Edwards*, 4 id. 288. In Virginia, *Taylor v. Beck*, 3 Rand. 316. In Vermont, *Pecker v. Sawyer*, 24 Vt. 459. In Connecticut, *Townsend v. Bush*, 1 Conn. 260. *Jackson v. Parker*, 13 id. 342. In New Hampshire, *Odiorne v. Howard*, 10 N.H. 343; *Haines v. Dennett*, 11 id. 180. In Michigan, *Orr v. Lacey*, 2 Doug. 280. In Kentucky, *Gorham v. Carroll*, 3 Litt. 221. In North Carolina, *Guy v. Hull*, 3 Murph. 150. In South Carolina, *Knight v. Packard*, 3 McCord, 71. In Georgia, *Slack v. Moss*, Dud. 161. In Alabama, *Todd v. Stafford*, 1 Stew. 199. In Texas, *Parsons v. Phipps*, 4 Tex. 341. In Missouri, *Bank of Mo. v. Hull*, 7 Mo. 273; *St. John v. McConnell*, 19 id. 88.

Smith v. Knight.

On the other hand, the rule of exclusion, as stated in the principal case, is adopted in the Supreme Court of the United States. *Bank v. Dunn*, 6 Pet. 51; *Bank v. Jones*, 8 id. 12; *United States v. Leffler*, 11 id. 86; *Scott v. Lloyd*, 12 id. 145; *Henderson v. Anderson*, 8 How. 78; *Saltmarsh v. Tuthill*, 13 id. 229; *Taylor v. Luther*, 2 Sumn. 235.

In Massachusetts, *Churchill v. Suter*, 4 Mass. 156; *Fox v. Whitney*, 16 id. 118; *Thayer v. Crossman*, 1 Metc. 416. In Maine, *Deering v. Sawtel*, 4 Greenl. 191; *Chandler v. Morlon*, 5 id. 874; *Clapp v. Hanson*, 15 Me. 345; *Franklin Bank v. Pratt*, 81 id. 501; *Lincoln v. Fitch*, 42 id. 456. In Pennsylvania, *Harding v. Mott*, 20 Penn. St. 469; *Pennypacker v. Umberger*, 22 id. 492; *Gaul v. Willis*, 26 id. 259. In Ohio, *Treon v. Brown*, 14 Ohio, 482; *Bodkins v. Taylor*, id. 489; *Rohrer v. Morning Star*, 18 id. 579. In Iowa, *Strang v. Wilson*, 1 Morris, 84. In Mississippi, *Drake v. Henly*, Walk. 541. In Tennessee, *Smithwick v. Anderson*, 2 Swan, 573.

In those States where the rule of exclusion is adopted it is usually only where the security has been put in circulation in the usual course of business and indorsed before maturity. *Baird v. Cochran*, 4 S. & R. 397; *Parke v. Smith*, 4 Watts & S. 287; *Thayer v. Crossman*, 1 Metc. 416; *Smithwick v. Anderson*, 2 Swan, 573.

The rule does not apply where the indorser is called to prove a fact not going to the original validity of the instrument, as payment or fraudulent alteration. *Work v. Kase*, 84 Penn. St. 133; *Zeigler v. Gray*, 12 S. & R. 43; *Buck v. Appleton*, 14 Me. 284; *White v. Kibling*, 11 Johns. 128; *Tuthill v. Davis*, 20 id. 285.

An indorser's declaration that the note was without consideration, or is paid, or is infected with other vices, is admissible against an indorsee, where the note was overdue when indorsed. *Peckham v. Potter*, 1 C. & P. 232; *Beauchamp v. Parry*, 1 B. & Ad. 89; *Hatch v. Dennis*, 10 Me. 244; *Bond v. Fitzpatrick*, 4 Gray, 89; *Wheeler v. Walker*, 12 Vt. 427; *Roe v. Jerome*, 18 Conn. 138; *Curtiss v. Martin*, 20 Ill. 557; *Cleveland v. Davis*, 8 Mo. 831. But a contrary rule was held in a learned judgment in *Paige v. Cagwin*, 7 Hill, 361, and in *Bailey v. Wakeman*, 2 Denio, 220. *Paige v. Cagwin* was approved in *Booth v. Sweetey*, 8 N. Y. 276, wherein it was held that, in an action brought by the assignee of a bond and mortgage against the mortgagor, the latter cannot give in evidence the declaration of the mortgagee, made prior to his assignment of the mortgage, to show that it was given upon a usurious loan. When the note is received *bona fide*, without notice and before it is due by the indorsee, he cannot be charged with such admissions. *Matthews v. Houghton*, 10 Me. 420; *Fitch v. Chapman*, 18 Conn. 8; *Smith v. Shank*, 18 Barb. 344; *Lester v. Beher*, 6 Blackf. 429.—R.R.P.

SMITH, appellant, v. KNIGHT.

(71 Ill. 148.)

Partnership — what constitutes.

A agreed to advance money to B from time to time up to a certain amount to enable B to carry on business; and B agreed to pay interest to A on the average balance advanced, and also to divide the profits after deducting a

Smith v. Knight.

fixed sum for expenses; but A was not to bear any losses. *Held*, that A and B were not partners as to third persons.*

ACTION of assumpsit by Smith against Knight and others. The opinion states the case.

George C. Fry, for appellant.

F. W. S. Brawley, for appellees.

BRESE, C. J. This was an action of assumpsit, brought to the Superior Court of Cook county, on the common counts, against appellees as partners. There was a default regularly taken against Cobb and Hennersheets, and issues made up by the other defendants, Knight and Baker, which were tried by the court without a jury, resulting in a finding and judgment in favor of the defendants.

The plaintiff appeals, and makes the points that the court excluded proper evidence offered by him, admitting improper evidence on the part of the defendants, and overruling a motion for a new trial.

The issues were *non-assumpsit*, and a plea, accompanied by affidavit, denying the alleged partnership and joint liability.

The plaintiff, to prove the partnership, introduced in evidence a written agreement, showing the terms on which appellees did business with Hennersheets, which we have examined, and are of opinion, with the court trying the cause, that it fails to establish a partnership relation between these parties. It recites that Hennersheets was doing, at the time the agreement was executed, a general commission business in Chicago, and to aid him in the prosecution of his business, Knight, Baker & Co. agreed to make certain advances to him. They agreed to advance, from time to time, such sums of money as they might deem proper, provided such advances should not exceed in the aggregate, at any one time, seven thousand dollars. For these advances Hennersheets agreed to pay this firm of Knight, Baker & Co. interest, at the rate of ten per centum per annum, on the average balance advanced, and, also, after deducting a certain amount for office expenses, to divide the balance of commissions equally between them, share and share alike — Hennersheets to have one-half and Knight, Baker & Co. the other

* But see *Parker v. Canfield* (37 Conn. 250), 9 Am. Rep. 317; *Leggett v. Hyde* (33 N. Y. 273), 17 Am. Rep. 244.

Smith v. Knight.

half ; but the latter were not to be liable for any loss incurred in the business or otherwise. And, as further and additional security for these advances, Hennersheets assigned to this firm his books, accounts, notes, drafts or claims which he then had or might thereafter have against any person or persons, for advances, commissions or otherwise, and, upon request, to deliver them over to the firm of Knight, Baker & Co., giving them authority to collect, compromise or settle the same, as the firm may deem best, and out of the proceeds to pay all costs and expenses of collecting, and the amount due this firm for advances, interest, and their proportion of the commissions, to pay the overplus to Hennersheets, his heirs or assigns. This agreement was entered into the 1st day of November, 1869, and to continue until the 1st day of January, 1871, if mutually satisfactory. There is no proof how long this agreement continued, but whilst it was in existence the plaintiff did business with Hennersheets, and now seeks to charge Knight, Baker & Co. on the ground of a partnership.

In determining this question, the intention of the parties must be considered. Written articles of copartnership may be so expressive as to leave no room for doubt. So far as these articles of agreement are concerned, we discover nothing in them evidencing an intention to form a partnership.

A case similar to this in many respects came before this court at the January term, 1868. Certain parties, partners, in Decatur, having an idea that money could be made in the manufacture of cultivators, but having no capital to engage in the business, induced a banker of that city to furnish the necessary funds. An agreement was entered into, by which the manufacture should be carried on by the parties applying for pecuniary aid, who should sell the machines, collect the proceeds, and return to the banker his advances, and account to him for one-third of the profits. The advances amounted to more than eight thousand dollars, exclusive of interest. The banker, having received no return for these advances, brought an action against the other parties, which was sought to be defeated on the ground they were partners, and that one partner could not sue his copartners at law, unless there was a balance struck, and a promise to pay it. The court held there was no partnership shown — that the agreement entered into was but a mode of getting compensation for the hire of money. *Lintner v. Millikin*, 47 Ill. 178.

Smith v. Knight.

In another case, where the arrangement was that one party was to furnish money and the other was to purchase cattle with it, the party furnishing the money to have his capital returned, with five per cent interest thereon, together with one-half the profits on a sale of the cattle, it was held the parties were not partners, as the one furnishing the money was exposed to no hazard of loss. *Adam v. Funk*, 53 Ill. 219.

In the case before us, it is specially agreed Knight, Baker & Co. were not to be liable for any losses that might be incurred in the business in which Hennersheets was engaged. As in the case last cited, where the party advancing the money was to have his advances returned, with five per cent interest thereon, and an equal share of the profits on the sale of the cattle, no partnership was created, and, as in the case first cited, two of the alleged partners disclaimed any partnership. Knight, Baker and Hennersheets, in this case, testified there was no partnership, and none was designed.

Those cases were between the alleged partners. It remains to inquire, as this is a case between alleged partners and a third party, whether any act was done by Knight, Baker & Co., to make them partners as to third parties. Notwithstanding this agreement, did they hold themselves out to the public as partners with Hennersheets, and was it on the faith of an existing partnership that plaintiffs dealt with Hennersheets? There is some slight evidence tending to show this, but when taken in connection with all the facts before the court, it failed to satisfy the court such a state of things existed. The evidence on this point may be said to be conflicting. We are inclined to think, with the circuit judge, the claim was not sustained. The onus was on the plaintiff to establish the partnership by a preponderance of evidence, as a plea, verified by affidavit, was pleaded by the defendants Knight and Baker. *Warren v. Chambers et al.*, 12 Ill. 124.

A point is made, and is assigned as error, that the court permitted Hennersheets, who had been defaulted, to testify that the firm of Knight, Baker & Co., of which he was a member, were not partners with him, he and Knight and Baker testifying to that fact.

We think there was no error in this, for Hennersheets' default could amount to no more than an admission by him of the part-

nership, as alleged, and such admission could not bind Knight and Baker.

We have not considered it important to inquire how the account stands between appellant and Hennersheets, as, in our opinion, no partnership has been established by the testimony.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

CORBLEY, appellant, v. WILSON.

(71 Ill. 200.)

Evidence — records in another suit — slander.

In an action of slander for charging plaintiff with the commission of a crime, the record of acquittal in a criminal prosecution for the same crime is not admissible either to prove the truth of the charge or to show malice.

ACTION on the case for slander. The opinion states the case.

J. B. Mann, J. Harper, R. W. Hanford and John M. & John Mayo Palmer, for appellant.

E. S. Terry and Townsend & Young, for appellee.

BRESE, C. J. This was an action on the case, for slander, brought to the Circuit Court of Vermilion county, by Benjamin Wilson against Edward Corbley, to which the defendant pleaded the general issue, and a special plea of justification, that the words spoken were true.

The jury found the defendant guilty, and assessed the damages at six thousand seven hundred dollars, on which the court rendered judgment, having overruled defendant's motion for a new trial. To reverse this judgment is the purpose of this appeal.

The charge made by the defendant against the plaintiff was the commission of a crime the most abhorrent to nature, which, if established, would ostracize the plaintiff from decent society. We shall express no opinion on one of the points made — that is, the amount of the damages — but have directed our attention to two

objections which we deem well taken, and which must reverse the judgment.

One objection is, that the court permitted the record of the criminal cause, *The People v. Wilson*, to be given in evidence to the jury against the objection of the defendant. This was clearly error. It is an axiom of the law, that no man should be affected by proceedings to which he was a stranger—to which, if he is a party, he must be bound. He must have been directly interested in the subject-matter of the proceedings—with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control, in some degree, the proceedings, and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause. Privies are, of course, bound, as they are the representatives of the real parties.

An exception to this rule is allowed in the case of verdicts and judgments upon subjects of a public nature, such as customs and the like; in most or all of which cases, evidence of reputation is admissible, and also in cases of judgments *in rem*; and it is said a judgment, when used by way of inducement, or to establish a collateral fact, may be admitted, though the parties are not the same, as, producing the record of conviction in order to prove the legal infamy of a witness, or to prove what was known at a trial, and cases of this nature. 1 Greenl. on Ev., § 522 *et seq.*

The record in this case was of a character entirely different. It was a public prosecution, in conducting which defendant had no agency or power, or rights, or interest at stake. It would be subversive of all justice to allow such testimony. What could be more efficacious toward a recovery by plaintiff than to show he had been indicted and tried for the crime and acquitted? Does this bind the defendant and defeat his plea that the charge was true? So far as the defendant in the indictment and the people are concerned, that record can speak anywhere and everywhere, and its tones must be heeded. But, on what principle is it that defendant should not be permitted to prove the charge, notwithstanding the verdict in the criminal trial? Though that is conclusive between the parties, it is not true as against the defendant. Verdicts of juries in criminal cases are not always responsive to the facts, though public policy demands they should be held, when followed by a judgment, as truth itself, but this only as to parties and privies, or in regard to some public matter, of which we have spoken.

But appellee insists its introduction was proper, to establish the *quo animo* the words were spoken. There is a *dictum* of Justice BLACKFORD, in *Abrams v. Smith*, 8 Blackf. 95, to this effect, but we do not concur with it, as at present advised.

Here was a plea of justification. If the words were true, and of their truth the defendant had assumed the responsibility of establishing, which he had a clear right to do notwithstanding the verdict of acquittal, the verdict and judgment had no place in the cause, for any purpose. If the charge was true, the defendant had a right to make it and to stand by it, and it was no evidence of malice that he did make it because a jury had acquitted him. The time may come when it will be for the best interests of the republic to make a public demonstration of the falsity of a verdict in a given case. Take the case of one suing for damages caused by the death of another, under the statute, should the acquittal of the wrongdoer on an indictment for the act discharge him from the proceedings in a civil suit? The case is, in principle, the same as this.

But it is said an injury was prevented by the ninth instruction given for the defendant on the point. This, if duly weighed and considered by the jury, might have had an influence, but all know how very difficult it is to eradicate from the minds of a jury an impression once produced by evidence of a seemingly strong character. What would jurymen say, in their consultation room, with this record before them? They would consider the case at an end, and, as a court and jury had once found the plaintiff not guilty, he must stand, in our eyes, as an innocent person, and the defendant's plea of justification, under such circumstances, amounts to nothing.

[The other questions considered were not important.]

Judgment reversed.

WHITE, appellant, v. MURTLAND.

(71 Ill. 280.)

Seduction — evidence — abortion — offer of marriage.

In an action for seduction of the plaintiff's daughter and servant, evidence that the defendant procured an abortion to be made is admissible in aggravation of damages, if such fact is charged in the declaration; and evidence of an offer of marriage by the defendant, after action brought, is not admissible in mitigation.

White v. Murtland.

ACTION on the case against White by Murtland, for the seduction of his daughter. The declaration also charged defendant with having procured an abortion to be made on the said daughter after so seducing her.

Evidence was given upon the trial tending to show that, in September, 1868, when Margaret was under 12 years of age, the plaintiff, her father, made a verbal agreement with Mrs. Jane White, the mother of the defendant, and who was a widow, that the girl might live with Mrs. White until she was 18 years of age, providing it was agreeable to all parties, Mrs. White agreeing to send her to school, take care of her, and, at the end of that time, give the girl a cow, a bed, and some other things. There was no contract in writing.

Evidence was also given tending to show that, in December, 1870, while Mrs. White was absent, at a neighbor's, the defendant took the girl, by force, into the parlor, and there, by holding his hand over her mouth, had carnal intercourse with her; that such intercourse was afterward continued until she became pregnant; that, in the spring of 1871, defendant employed a doctor for the purpose, who produced a miscarriage on her, from which she became sick, in May, 1871, whereupon both Mrs. White and defendant absconded, and plaintiff afterward took her home, where she was sick and under a doctor's care for a long time.

There was also evidence that after this suit was brought, defendant offered to marry the girl, but the court charged the jury that they should not take such offer into consideration in mitigation of damages.

The jury returned a verdict for plaintiff for the sum of \$6,000. The defendant brought the case up by writ of error.

Manier, Peterson & Miller and H. W. Draper, for plaintiff in error.

C. F. Wheat and D. G. Tunnickliff, for defendant in error.

MCALLISTER, J. [After deciding questions not of general interest.] The third specification involves the right of plaintiff, under his declaration, to give evidence tending to show the abortion. His counsel insist that it was too remote, and had no necessary connection with the real *gravamen* of the action, even if defendant caused its production. It was, they say, a separate and distinct wrong.

This particular wrong is specifically charged in the declaration. The plaintiff had his election to bring his action in trespass or *case*. He brought it in the latter form. If he had brought trespass, we perceive no reason why he could not have added a separate count for the abortion, because, upon the plainest principles of the common law, if somebody else had gotten the girl with child, and the defendant had caused the abortion, whereby she became sick, and plaintiff lost her services, the action would lie, because, as to plaintiff, she could not consent to that, any more than to the carnal intercourse. Chitty, speaking of the action of trespass, says: "So, it lies for an injury to the relative rights, occasioned by force, as for menacing tenants, servants, etc., beating and wounding, and imprisoning a wife or servant, whereby the landlord, master or servant has sustained a loss; though the injury, the loss of service, etc., were consequential, and not immediate. It lies for criminal conversation, seducing away a wife or servant, or for debauching the latter, force being implied, and the wife or servant being considered *as having no power to consent*; and a count for beating the plaintiff's servant, *per quod servitium amisit*, may be joined with other counts in trespass, and though it has been usual to declare in *case* for debauching a daughter, it is now considered to be preferable to declare in trespass." 1 Chit. Pl. 168.

If plaintiff had declared in trespass, and, after alleging the assault carnal intercourse and getting her with child, had then alleged, in the same count, the causing the abortion at a subsequent time, without averments connecting this with the original trespass, the count might have been demurrable for duplicity; but if defendant, without demurring, took issue upon it, he could not exclude evidence of that trespass. In actions on the case, much broader scope is allowable, and the count is not subject to the same technical rules as to singleness, as in trespass.

We have seen that, as to the carnal intercourse, the consent of the daughter is of no avail, so far as the father is concerned, because, as in the case of the wife, she is incapable of consenting. For the same reason, without regard to the criminal law, she is incapable of consenting to an abortion. The act of the defendant in causing it would, therefore, be illegal, and, as to the father, amount to a trespass which, if followed by sickness and loss of service, would be actionable. Now, in legal contemplation, is there no connection between the original wrong of debauching and get-

White v. Murtland.

ting her with child, and the act of getting rid of the child, in order to conceal and avoid detection of such original wrong? According to the common law, the mere act of carnal intercourse with the daughter does not give the right of action in the father. There must concur the pregnancy, the sickness incident thereto, and, theoretically, the consequent loss of service, but, *in reality*, the loss of the comfort and society of the daughter, and of the honor of the father and his family; so that the debauchery, the pregnancy, the sickness consequent thereupon, involving the disability and disgrace of the daughter, are all constituents of the cause of action. Can it, therefore, be successfully maintained that this defendant, having thus unlawfully violated the rights of the father, but who, in order to conceal and escape the consequences of that wrong, has led, or caused that daughter to be led, into the commission of this great self-abuse, seriously injurious to her, both morally and physically, and thereby precipitated and aggravated that sickness, which, in the ordinary course of nature, would follow the original wrongful act, may be permitted to say, in this action, that this second unlawful interference is so disconnected from the original wrong that it forms no part of it? The substance of it is, that, for the defendant's own protection from the consequences of his original wrong, he subjects this daughter to another, which carries the corruption of her morals to an extreme degree, imperils her health and life, and exposes her to a deeper disgrace; and yet it is insisted that the fact cannot be given in evidence as an aggravating circumstance, because it is wholly disconnected from the cause of action. We cannot concur in that view. The *res gestæ* here includes the debauching plaintiff's daughter, the consequent pregnancy, the forcible birth, and consequent sickness and loss of service. All are ingredients of causes of action, though all are not indispensable ingredients.

In *Klopfer v. Bromme*, 26 Wis. 373, it was held that evidence of an abortion produced by the defendant is not inadmissible on the ground that the damages it tends to prove are too remote.

[The court then considered other assignments of error and continued.]

It has been urged that an offer of marriage, made through defendant's attorney on his behalf, after suit brought, should have been considered in mitigation of damages, and that the court erred in instructing the jury that it could not. If such a rule

First National Bank of Quincy v. Ricker.

should be recognized in this case, it would be applicable to every other. There seems to us to be no sound principle upon which such a doctrine can rest. We will not stop to suppose cases of a class frequently occurring, but any one may conceive of them, where, from the character of the defendant, the fraud, deception and hypocrisy used in accomplishing the seduction, such an offer would be but adding insult to injury. The authorities, so far as there are any upon the question, are against its admissibility. Sedg. on Dam. 683; *Ingersoll v. Jones*, 5 Barb. 661.

We perceive no error in refusing instructions asked for defendant, but, inasmuch as the damages awarded are very large, if not excessive, we feel constrained to reverse the judgment, for the errors pointed out, believing that it ought to go before another jury.

Judgment reversed.

FIRST NATIONAL BANK OF QUINCY, appellant, v. RICKER.

(71 Ill. 439.)

Forged check — recovery by drawee of money paid on.

The defendant received a check in good faith and for value, but afterward had reason to doubt its genuineness. He presented it to plaintiff's bank, on which it was drawn, and demanded payment without disclosing his suspicions. The teller expressed doubts as to the signature, but said he would pay it if defendant would indorse it, which he did. *Held*, that the plaintiff on finding that the check was a forgery might recover back from the defendant the money paid on it.*

ACTION by Ricker against the First National Bank to recover back money paid on a forged check drawn on plaintiff's bank, and held and presented by the defendant bank.

The check purported to have been drawn by Manning Bros. upon Ricker's bank, and was payable to the order of Hundrack & Co. The latter deposited the check in defendant's bank, and drew against it nearly the full amount thereof. Directly after defendant had reason to doubt the genuineness of the signature to the check,

* See *National Park Bank v. Ninth Nat. Bank* (46 N. Y. 77), 7 Am. Rep. 310, and note, 813; *First National Bank v. Tappan* (6 Kans. 456), 7 Am. Rep. 508; *National Bank v. Bangs* (106 Mass. 441), 8 Am. Rep. 349.

First National Bank of Quincy v. Ricker.

and sent it by one Mills, a clerk, to the plaintiff's bank for payment. Plaintiff's teller stated that he was not familiar with the drawer's signature, but that if Mills would indorse it for his bank he would pay it. Mills indorsed it; got the money; returned it to defendant; informed his cashier of what he had done, which the cashier approved. The plaintiff discovered the check was a forgery and offered to return it, demanding the money paid. The facts are stated more fully in the opinion of the court. The plaintiff had judgment, and defendant appealed.

Skinner & Marsh, for appellant.

Wheat & Marcy, for appellee.

SCOTT, J. The cases are numerous that decide the drawee must be presumed to know his correspondent's signature. In case he makes payment to an innocent holder for value, he is concluded by the act, notwithstanding the bill may turn out to be a forgery. If he accepts a bill he must pay it, and if he has paid it in the usual course of business, he cannot recover the money back from the payee or holder. *Price v. Neale*, 3 Burr. 1354; *Wilson v. Alexander*, 3 Scam. 392; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333.

The same principle, for still more politic reasons, has been held to apply to bankers in the payment of bank notes and checks. Bankers are supposed to have a better opportunity to know the signatures of their depositors to checks than a drawee that of a single correspondence, whose bills are drawn with less frequency, and are, perhaps, held to a higher degree of diligence in that regard.

The principles applicable to checks and to bills are regarded as sufficiently analogous to make a decision rendered upon one instrument a precedent for a case arising on the other. Hence, we find the case of *Price v. Neale* is referred to in nearly or quite all the decisions on this question.

This was an action to recover back money paid on two forged bills. It was declared the plaintiff could not recover, for the reason the defendant had received the money on the bills indorsed to him for a valuable consideration without any suspicion of forgery, and that it was incumbent on the plaintiff to be satisfied the bill drawn on him was in the drawers' hand, before he accepted or paid it, but it was not incumbent on the defendant to inquire into it.

First National Bank of Quincy v. Ricker.

The doctrine of this case, so far as it holds the drawee is bound to know the handwriting of his correspondent, when applied to the case of a bill accepted or paid by him, where the drawee's name has been forged, has seldom, if ever, been departed from. It is said to have its foundation in a sound public policy, and considerations of convenience in commercial transactions make it imperative it shall be enforced.

The general rule, no doubt, has its exceptional cases, and the doctrine as stated, by Lord MANSFIELD in *Price v. Neale*, has certainly been very much limited by more modern decisions. The difficulty does not lie in the general rule itself, for it is undoubtedly supported by reason and the weight of authority, but in its application to particular cases.

It will, perhaps, afford a clearer understanding of the points in controversy if we give a brief history of the case at bar, as made by the evidence.

On the morning of the 24th of June, 1878, Hundrack & Co. deposited with the appellant bank three checks, purporting to be drawn in their favor by business firms of the city. Among them was the check in controversy, purporting to be signed by Manning Bros., and drawn upon appellee. The party making the deposit immediately drew out nearly the entire deposit. This transaction occurred after the hour of 10 o'clock, at which hour the exchanges of checks between the several banks are usually made.

On the same day, and about the same hour, Hundrack deposited a number of checks in the Union Bank, and in like manner drew out the largest portion. Among the checks deposited with the Union Bank was one of Bagby & Wood. About 11 o'clock of that day it was presented at the appellant bank to ascertain if it was all right, when the clerk was told there was no funds there, but probably would be by 3 o'clock. In the afternoon the attention of Wood was called to this check, and it was, upon inquiry, found to be a forgery.

In the usual course of business checks of other banks received after 10 o'clock would be retained until that hour the next day, when the checks would be exchanged and the balances paid. When it was discovered the checks of Bagby & Wood were forgeries, there was some uneasiness manifested among the officers of the appellant bank and those of the Union Bank in regard to these and other checks that had been deposited by Hundrack. The Union Bank

First National Bank of Quincy v. Ricker.

had also taken from Hundrack & Co. a check of Manning Bros. on appellee's bank. Both parties were anxious to know whether the checks they had taken were genuine. On sending them to appellee's bank, shortly before 3 o'clock, they were promptly paid.

There is a direct contradiction in the evidence as to what passed between the witness Mills and the teller of appellee's bank, when the former presented Manning Bros.' check, the one in controversy, for payment. It is certain Mills did not communicate the suspicions that had been aroused on learning the Bagby & Wood checks were forgeries; that the checks of Schermerhorn Bros. & Co., drawn on the Union Bank, were probably forgeries, and that T. S. Hundrack, who had made the several deposits in the name of Hundrack & Co., and who alone constituted that fictitious firm, had fled the city. All these facts were within the knowledge of some of the principal bank officers before Mills was sent to appellee's bank with the check.

The signature to the check purported to be in the handwriting of August Manning. The brother, who usually signed the checks, is Antoine. The proof shows August signed but few checks, and hence the bank's officers were not, in fact, very familiar with his signature. It was an adroit contrivance on the part of the forger to avoid detection, for it is proven August was temporarily absent from the city on that day.

The teller of appellee's bank testifies he first saw the check in the morning; that it was presented by a man who represented himself to be Hundrack, but he did not know him. He declined to pay it then, because he had doubts about the signature. When Mills presented it in the afternoon to get it certified, he says he told him he was not acquainted with the signature, but supposed it was the signature of one of the Manning Bros., with which he was not acquainted, but if he would indorse the check, he would pay him the money. Mills then indorsed it for appellant, and the teller paid him the money. He returned and told the cashier of the appellant bank what he had done — that he had indorsed the check and got the money. The reply was, "It is all right."

Mills denies, however, much of this conversation with the teller, but admits he indorsed it because it was the custom among banks to stamp or indorse checks payable to order. He further admits the teller said to him, "You indorse it, and I will pay you the money," to which he replied: "I said to him I did not know

First National Bank of Quincy v. Ricker.

whether I was authorized to indorse it, but I would do so; and I indorsed it, and he paid me the money."

Appellee soon discovered the checks were forgeries, and the same afternoon, within a few hours, offered to return the one in controversy to appellant, and demanded the money paid on it, which was refused. It clearly appears the forger had fled before the checks were presented for payment.

The principle that lies at the foundation of all the cases on this subject, and which is said to preclude a recovery, is, that the drawee is presumed to know the signature of the drawer. Having accepted or paid the bill, he is estopped, on considerations of public policy, from denying that which it was his duty to know. The law will not permit him to allege he was mistaken, when no fraud has been practiced upon him. The doctrine proceeds on the ground the loss has arisen through some neglect or default, and the presumption being the drawee knows his correspondent's handwriting, if he pays or accepts a forged bill, it will be presumed it was through some carelessness on his part, and the law will impose the loss on him.

The rule, however, presupposes the good faith of the transaction, that the holder was a purchaser *bona fide* for a valuable consideration, for the law certainly is, the drawee or payor can recover where the payee or holder is himself at fault, or has been guilty of fraudulent practices which may have thrown him off his guard. The reason assigned for the decision in *Price v. Neale* is, that the defendant had received the bills for "a fair and valuable consideration, which he had *bona fide* paid, without the least privacy or suspicion. Here was no fraud, no wrong." Great stress is laid on the fact "the plaintiff lies by for a considerable time after he had paid these bills, and then finds out that they were forged, and the forger comes to be hanged."

The reasoning of this case seems to have been adopted in nearly all the cases on this subject, with more or less distinctness. Hence we discover, in very many of the cases where it has been held the drawee cannot recover back money inadvertently paid on a forged bill or check, that one element of defense was in not giving prompt notice to the payee or holder, the instrument was a forgery. The tendency of all modern decisions seems to be, that, where there has been an unreasonable delay in discovering the forgery and giving notice, it will, in every instance, bar a recovery by the payor

First National Bank of Quincy v. Ricker.

It will be observed, from a consideration of the evidence in the case at bar, there is almost a total absence of those facts upon which the decisions have been rested, that hold the payor cannot recover back money paid by mistake on a forged bill. There was no unreasonable delay in giving notice the check was a forgery. It was given in a few hours after the payment was made. The forger had fled before the check was presented, and hence it cannot be said the delay worked any injury to appellant, or prevented the bank from securing itself, or that the payment, if retracted, made its condition any worse than if appellee had refused payment in the first instance. But more important than all, there is wanting in this case that element of good faith that is to be found in nearly all the adjudged cases where a recovery has been denied.

It is doubtless true the appellant bank received the check in the usual course of business of Hundrack, without any suspicion it was a forgery. But when it was presented for payment the bank officers had every reason to believe it was spurious, and that the forger had absconded. They knew Bagby & Wood's checks were forgeries. No actual knowledge had then been obtained the Manning Bros.' checks were forgeries, but they had such information as gave ground for such belief, and would put any prudent man on his guard. Without imparting the information in their possession, the check was presented at appellee's bank, not, perhaps, for payment, but for certification.

There is testimony to the effect, and the jury had the right to give credence to it, that the teller of appellee's bank told appellant's clerk he did not certainly know the signature to the check, but would only pay it on condition it was indorsed by appellant, which was done. It is hardly probable the check would have been paid but for the indorsement. No one can believe appellee would have paid the check had his teller been put in possession of the facts then known to the officers of the appellant bank or the Union Bank. The cashier was in possession of such facts as made it morally certain at least that it was a forgery, before he sent the check to appellee's bank for certification. This information was withheld. Was this good faith? These facts rendered it "against conscience," to use the terse language of Lord MANSFIELD in *Price v. Neale*, for appellant to retain appellee's money.

It is sought to bar a recovery, for the reason it is said appellee is estopped to deny he knew the signature of his own depositor.

First National Bank of Quincy v. Ricker.

The defense is not rested so much on the ground of an *estoppel in pais* as upon an *estoppel* arising out of a presumption in pursuance of legal obligation, as understood in commercial law. Such an *estoppel* is of vastly less significance than one created by deliberate acts of the party which it would be inequitable for him to retract. The doctrine of *estoppel* insisted upon, as was said in *Hefner v. Vandolah*, 57 Ill. 520; S. C., 11 Am. Rep. 39, concerns conscience and equity, and the party who would avail of it must himself have acted in good faith toward the party on whose conduct he relied, or it will constitute no bar to the assertion of the truth. We conceive this to be pre-eminently a case where this most equitable principle would find its most appropriate application. Appellant claims it relied on the obligation of appellee to know the signature of his own depositor, and insists he is estopped, by reason of this legal presumption that prevails in banking and commercial transactions, to say he was mistaken. But did the officers of the appellant bank act in good faith toward appellee in withholding the knowledge of those facts they possessed? This guilty conduct induced the very action the bank relies upon as an *estoppel*, and it seems to us it would be most inequitable it should prevail as a defense.

It is contended there is no duty resting on the innocent holder of a check, on presenting it for payment, to communicate to the bank suspicions he may have as to its spurious character, if at the time he took it he had no reason to suspect it was a forgery. The cases of *The Bank of St. Albans v. The Farmers' Bank*, 10 Vt. 141, and *Ward v. Allen*, 2 Metc. 53, are cited in support of this proposition.

We have looked into those cases, but we do not think they sustain the doctrine to the extent asserted. While we have the highest respect for the courts that rendered those decisions, we must be permitted to express our dissent from the principle insisted upon, as being unsound in law and in good conduct. No warrant can be found for its introduction in the exigencies of banking or commercial transactions. Such a doctrine, in our opinion, would tend rather to debase than maintain commercial integrity.

Where exceptional circumstances and excusing facts are made clearly to appear, courts have permitted a recovery, and in some instances very slight palliating circumstances have been declared sufficient. The case of *Wilkinson v. Johnson*, 3 B. & C. 428, is a well-reasoned case on this point.

First National Bank of Quincy v. Ricker.

The case of *Goddard v. The Merchants' Bank*, 4 N. Y. 147, is a still stronger case illustrative of the exceptions to the general rule. In that case, the plaintiffs were informed a draft had been drawn by their correspondent, a bank in Ohio, on the American Exchange Bank, at New York, which had been protested, and was then in the hands of the notary. The plaintiff called to see the notary about taking up the draft, but, owing to his absence, did not see the draft. On this information the plaintiff acted, and supposing his correspondent (the Canal Bank) had, by mistake, drawn on the Exchange Bank, with which it had just before kept an account, instead of drawing on the plaintiffs, and wishing to protect the credit of the drawers, he left a check with a party in the office, to be delivered to the notary, to take up the draft, and gave directions to have it sent to his office that day. The notary took the check and paid the money to the defendants, but failed to send the draft as requested. When the plaintiff called the next day on the notary, for the draft, on its production he immediately pronounced it a forgery, and, thereupon, went to the defendant's bank and demanded the money back. On this state of facts the plaintiffs were permitted to recover, on the ground they were guilty of no negligence, as the notary, when he received the check, and handed it over to the defendants, both he and they tacitly affirmed the draft was genuine.

In *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458, while admitting the full force of the general rule, it was, nevertheless, ruled, where a party becomes the holder of a forged draft before it had been accepted, and the loss had already attached before payment by the acceptors, who, immediately on ascertaining the spurious character of the paper, gave notice to the holders, such a case was an exception to the general rule, and the acceptors were not estopped from proving the forgery and recovering the money back.

The principle upon which the case is decided is, the holder had suffered no loss, it having already occurred, and he ought not to be permitted to profit by the mere accident of payment.

In the case at bar the accident of payment was produced, if the testimony of the teller of appellee's bank is to be believed, by the act of appellant's clerk indorsing the check. Payment had been refused in the morning, on the ground the teller had doubts as to the signature. While it is not claimed a recovery can be had

Illinois Central Railroad Company v. Godfrey.

under the present declaration on the indorsement, it is a fact that tends to show appellee was guilty of no negligence in paying the check. The fact of the indorsement induced appellee to waive his doubts as to the genuineness of the signature of his depositor, which he would not otherwise have done. These facts bring the case at bar clearly within the principle of the decision in *Goddard v. The Merchants' Bank, supra*.

The instructions given were substantially correct, and were such as the nature of the case required. Upon the whole record we are satisfied the verdict was warranted by the law and the evidence. The judgment must, therefore, be affirmed.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY v. GODFREY.

(71 Ill. 500.)

Negligence — duty of railroad company toward one unlawfully walking on the track.

Plaintiff, while passing, for his own convenience, over a portion of defendant's railroad line, where the public were in the habit of passing and re-passing, was injured through the alleged negligence of defendant. *Held*, that the right of way was the exclusive property of the defendant; that the fact that the defendant had passively permitted others to use it as a foot way, gave plaintiff no right thereon, and imposed no duty on the defendant to provide safe-guards against the dangers incident to such use, and that the defendant would only be liable for willful injury or gross negligence.

ACTION on the case, by Godfrey against The Illinois Central Railroad Company, to recover damages for injuries received through the alleged negligence of defendant's servants.

Plaintiff was injured, while walking on defendant's track, by defendant's switch engine, at Decatur, a short distance north of the crossing of the Toledo, Wabash and Western Railway. Defendant's road at that point consisted of three parallel tracks. Plaintiff was returning from a search for his cow, and was walking between the tracks, when the engine struck him and injured him. Plaintiff testified as follows :

"I passed over the T., W. and W. Railway, going home ; looked behind me and didn't see any engine ; got on the Central track on

Illinois Central Railroad Company v. Godfrey.

the north side of the T., W. and W. Railway, where the roads cross ; had passed there a good many times for the last seven years ; I was walking along there between the two west tracks ; had got about 30 steps north of the T., W. and W. Railway ; just as I was going north, one of the hands from the freight house said, 'look out' ; I heard him, and before I could look round I was struck ; was knocked down ; it was about half past 3 o'clock P. M. ; didn't see any engine when I got on the road ; didn't hear a whistle or bell sounded ; I didn't know which track it was on when I heard the man speak."

Persons had been in the habit of passing and re-passing, on foot, between the middle and west tracks on defendant's road, from the crossing north, past the point of accident, for a number of years, without objection by the company.

There was two or three persons on the engine at the time of the accident, but they were looking at an engine on the T., W. and W. Railway, and did not see plaintiff. There was no fireman on the engine.

Upon the trial the following instruction, among others, was given for the plaintiff :

"2. If the jury believe, from the evidence, that, on or about the 4th day of November, A. D. 1871, the plaintiff was walking upon the right of way of the defendant, north of the intersection of the railway of the defendant with the Toledo, Wabash and Western Railroad, in the city of Decatur, Illinois, and that the place where the plaintiff was so walking was a public thoroughfare, used by the citizens of said city, to pass and re-pass thereon, without hindrance or objection by the defendant ; and if the jury further believe, from the evidence, that, while the plaintiff was so walking on said right of way of defendant, and that he was using due care and caution in walking thereon, an engine of the defendant was negligently and carelessly run upon and against the plaintiff, while said engine was under the control and management of the servants of the defendant, and that the plaintiff was injured by and through such negligence and carelessness of the servants of the defendant, then, in such case, the jury should find for the plaintiff."

The defendant asked for several instructions which were refused. The plaintiff recovered, and the defendant appealed.

Nelson & Roby, for appellant.

Illinois Central Railroad Company v. Godfrey

Crea & Ewing, W. W. O'Brien and Park & Lee, for appellee.

SHELDON, J. This cause was tried in the court below, and submitted to the jury, as manifested by the instructions given and refused, upon an erroneous theory, which was, that from the fact of the citizens of Decatur having been in the habit of passing and re-passing over the portion of defendant's right of way, where the injury in question occurred, the plaintiff had acquired some right which affected the defendant's relation toward him, and that, at the time of the accident, he was in the exercise of a legal right. It very materially affects the question of the respective duties and liabilities of the parties, whether, at such time, the plaintiff was in the exercise of a legal right or not.

The right of way was the exclusive property of the company, upon which no unauthorized person had a right to be, for any purpose. The plaintiff was traveling upon defendant's right of way, not for any purpose of business connected with the railroad, but for his own mere convenience as a foot way in reaching his home on return from a search after his cow. There was nothing to exempt him from the character of a wrong-doer and trespasser in so doing, further than the supposed implied assent of the company, arising from their non-interference with a previous like practice by individuals.

But, because the company did not see fit to enforce its rights, and keep people off its premises, no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident. *Sweeny v. Old Colony and Newport Ry. Co.*, 10 Allen, 373; *Hickey v. Boston & Lowell Ry. Co.*, 14 id. 429; *Phil. and R. R. Co. v. Hummell*, 44 Penn. St. 375; *Gillis v. The Penn. Ry. Co.*, 59 id. 129.

For all the purposes of this suit the plaintiff stands in no more favorable condition than that of a wrong-doer and trespasser. He was not, at the time of the accident, in the exercise of a legal right, and was in the enjoyment of no more than a bare license or assent

Illinois Central Railroad Company v. Godfrey.

tacitly given, and his duty and the obligation of the company are to be measured, as in the case of one thus situated. Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it. But where the plaintiff is himself in the wrong, or not in the exercise of a legal right, or was, at the time, enjoying a privilege or favor granted without compensation or benefit to the party granting it, and of whose carelessness complaint is made, he, the plaintiff, must use extraordinary care before he can complain of the negligence of another. *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585.

As a general rule, it is culpable negligence to cross the track of a railroad at a highway crossing, without looking in every direction that the rails run, to ascertain whether a train is approaching. *Shearm. & Redf. on Negligence*, § 488, and cases cited in note; and the same degree of care and precaution, of course, should be required on the part of one traveling laterally upon the track.

With increased force did this requirement apply to this plaintiff, who was not lawfully using the railroad track. He only says that when he went on to the road he looked and saw no engine. But this was not enough. He should have kept constant watch while he was traveling along the track for the approach of an engine. Besides, there was ample space between the tracks for plaintiff to have walked, without exposure to danger on either track; and there would seem to have been an omission of due care in not so walking in the place where he was, as not to place himself needlessly within striking distance of the engine.

The negligence of defendant alleged in the declaration is, in not ringing a bell or blowing a whistle before the engine crossed the railroad crossing, and in not slackening speed as it approached and passed over the crossing, and in running at a great rate of speed; and it is further insisted on in argument, as negligence, that there was no fireman employed on the engine, and that those in charge of the engine had their attention directed to the train on the other road, near the crossing, instead of forward, along the track. But the defendant, under the circumstances of this case, is clearly chargeable with no such negligence as this. It is only for wanton or willful injury that the defendant is here chargeable, or such gross

Illinois Central Railroad Company v. Godfrey.

negligence as evidences willfulness. Notwithstanding the plaintiff was unlawfully upon defendant's right of way or not in the exercise of a legal right, and that his own lack of ordinary care exposed him to the risk of injury, yet the defendant might not, with impunity, wantonly or willfully injure him. And if defendant's servants, who were in the management of the engine, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him, defendant might be liable. And this, as we conceive, is the only measure of liability to be claimed, under the facts of this case, laying out of view any breach of the ordinance, which will be hereafter referred to. *The Aurora Branch R. R. Co. v. Grimes*, *supra*; *Galena & Chicago Union R. R. Co. v. Jacobs*, 20 id. 478; *St. Louis, Alton & Terre Haute R. R. Co. v. Todd*, 36 id. 409; *Chicago & Alton R. R. Co. v. Gretzner*, 46 id. 74; Shearm. & Redf. on Negligence, §§ 25, 36; 1 Redf. Law of Railways, 464, 468; *The Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; *Phil. and R. R. Co. v. Hummell*, and *Gillis v. The Penn. Ry. Co.*, *supra*.

The principle embodied in defendant's refused instructions is in conformity with the views here expressed, and, as applied to the facts of this case, we regard them as substantially correct, and that they should have been given.

The 2d instruction given for the plaintiff (and the 6th and 7th are liable to the same objection) is erroneous, in intimating the idea that the use of defendant's road by citizens, to walk back and forth upon without hindrance or objection by defendant, constituted the same a public thoroughfare for people to walk upon.

The company did not, in any sense, hold forth an invitation to the public to use this track for foot travel. The railroad company owned the right of way, and had a clear right to a free track, which they had not yielded up or modified by any act of their own, and the jury should not have been misled, by the instructions to think otherwise, as they well might have been.

The omission to notice other instructions given for the plaintiff is not to be understood as an implied sanction of them. In so far as they may run counter to the views here announced, they must be deemed erroneous.

What has been said is without reference to the question of the rate of speed of the engine being greater than that prescribed by the ordinance of Decatur, introduced in evidence. The declaration contains no allegation that there was a city ordinance regulating

Henderson v. Palmer.

the speed of trains, and objection was made to the introduction of the ordinance in evidence, because the defendant had not been charged with a breach of the ordinance.

In *Illinois Central R. R. Co. v. McKee*, 43 Ill. 119, the negligence charged in the declaration was in not maintaining and keeping in repair a fence; and it was held that testimony was inadmissible that a gate on the line of the fence had been left open, because there was no allegation of negligence in that respect, to give notice to the defendant of what he was to defend against. Under the authority of that case we think the ordinance should have been excluded. Besides, the testimony as to the rate of speed being in excess of that prescribed by the ordinance, was conflicting, which rendered it important that the jury should have been correctly instructed in other respects. What effect running at a rate of speed prohibited by the ordinance might have upon the rights of the parties, we are not to be understood as expressing no opinion in regard thereto.

The judgment must be reversed and the cause remanded.

Judgment reversed.

HENDERSON V. PALMER.

(71 Ill. 579.)

Negotiable instrument — consideration — agreement to discontinue criminal prosecution.

A promissory note, and a mortgage to secure it, were given in consideration that a prosecution for a felony should be discontinued. The mortgage was afterward foreclosed by a proceeding in which a want of consideration could not be pleaded as a defense, and the property was sold to an agent of the mortgagee. *Held*, (1) that the consideration of the note and mortgage was illegal and void; and (2), that a court of equity would cancel the note and mortgage, and set aside the foreclosure and the sale. (*See note, p. 121.*)

BILL in equity, to set aside and cancel a promissory note and a mortgage given to secure the same, and also a judgment of foreclosure of the mortgage and a sale thereunder

N. M. Knapp, for appellant.

Wm. Thomas, for appellee.

WALKER, J. It appears from the record in this case that one H. B. Henderson, the son of appellant, was employed as an operator by a telegraph company in Chattanooga, in the State of Tennessee, prior to the year 1867; that the officers of the company instituted a criminal prosecution against him for embezzling \$220, money of the company; that by the laws of the State of Tennessee embezzlement is made a felony. After the prosecution was commenced, on the 26th day of November, 1867, appellant was, to stop the prosecution against her son, induced to execute a note, with her husband and another, for \$980, and a mortgage on the house and lot in which she and her husband lived, to one O. H. Palmer, an agent of the company, to secure the payment of the note. The house and lot was her sole property, derived from other sources than from her husband. There seems to be no question that the consideration for the note and mortgage was a promise that her son should be discharged and the prosecution dismissed. There was no agreement even that the son should be discharged from the claim of \$220, which was set up against him by the officers of the company.

On the 25th day of February, 1869, she was induced to execute a new mortgage on the same premises to secure the payment of the same note, and the first mortgage was canceled. She claims that she was induced to do so under threats of foreclosure and sale; but this is denied, and it is insisted that time was given as the inducement to execute the new mortgage, which was desired to cure a defect in her acknowledgment of the first mortgage. Afterward, Palmer, the mortgagee, sued out a writ of *scire facias* from the Circuit Court of Morgan county to foreclose the mortgage. A judgment by default was entered, no defense being made, and on a sale of the property, Thomas, the attorney for the mortgagee, became the purchaser for his use, and the time for redeeming the house and lot had expired. Thereupon this bill was filed to set aside and cancel the note, mortgage, judgment and sale of the property, as to complainant, because they were, as to her, void, but operated as a cloud on her title. Appellant, in her bill, alleges that she was informed by her husband that the attorney for mortgagee had agreed not to take judgment in the *scire facias* proceeding, without giving him notice, but had given none. This is denied, but the husband testifies that such was the agreement, and the wife that she was so informed by her husband. Thomas, on the other hand, testifies that no such agreement was made. On a hearing, the court

Henderson v. Palmer.

below denied the relief and dismissed the bill, and complainant appeals to this court.

We regard the evidence as clear and convincing that the property mortgaged belonged to appellant in her own right, and that the only consideration of the note was the agreement to dismiss the criminal prosecution against the son of appellant. Even if it could be inferred that it was intended to secure the \$220 claimed to have been used by the son, still there would be \$760 for which there was no other consideration than the agreement to dismiss the prosecution. Is this, then, such a consideration as will support the note and mortgage; or is such a consideration illegal, and does it render them voidable? If there had been an indebtedness, as claimed, we presume that it could and would have been proved against H. B. Henderson. But there is no proof that he owed the telegraph company even the \$220 claimed to have been embezzled, nor any other sum. It was denied that he owed the company that or any other amount, and the evidence of Van Duger, who examined the books, tends to prove that he was not indebted to the company in any sum whatever. The copy of the indictment did not prove it, or any other fact. But even if he did owe a small portion of the amount, that would not warrant the extortion of the balance. When such a prosecution was pending, those pressing the prosecution knew the power it gave them to extort money of the mother, and the evidence seems to show that they availed themselves of the power to procure the note and mortgage. The rule is fully recognized, that when a contract grows immediately out of, or is connected with, an illegal or an immoral act, a court of justice will not lend its aid in its enforcement. *Nash v. Monheimer*, 20 Ill. 215. Where money is paid to compound a felony, or an agreement, even, entered into to pay money for such a purpose, such a contract is immoral and illegal. If money is paid, or agreed to be paid, on an agreement not to prosecute for a larceny or other crime, such an agreement is the compounding of a felony, and is itself a crime, and indictable as such. *Bothwell v. Brown*, 51 Ill. 234. It has been held to be compounding a felony where a person receives a note signed by a party guilty of larceny, as a consideration for not prosecuting him. *Commonwealth v. Pease*, 16 Mass. 91; *Wallace v. Hardacre*, 1 Camp. 45. "Any contract as security, made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offense, without leave of the court, is

invalid." 1 Ohit. Crim. Law, 4; 5 East, 298; 11 id. 46, and the other cases cited in support of the text.

In the case of *Collins v. Blantern*, 2 Wils. 347, which was a suit on a bond given to stifle a prosecution for perjury, Lord Chief Justice WILMOT, in delivering the opinion, used this language: "We are all of the opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever." The court further said: "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law, and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity; all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice."

As a general rule, if any part of an entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or at common law, the whole contract is void. "If a part of the consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal." Parsons on Contracts, vol. 1, p. 380. And it is believed that he announces the well-recognized rule of the common law.

It then follows that this note and mortgage were void, as being given in violation of law, and for an immoral and illegal purpose, and appellee should not be permitted to profit by such a transaction. He should not reap the fruits of such a contract, and there was no equitable or legal ground for enforcing the payment of the money or the sale of the mortgaged premises. Nor did the execution of the present mortgage, and the satisfaction of that previously given, affect the rights of the parties in the slightest degree. The note was the principal thing, and the mortgage was but an incident. The note being tainted by the corrupt consideration, it was illegal and could be avoided, and through it, and as a part of the same transaction, the mortgage partook of the same vice, and its enforcement could be resisted on the same grounds and for the same reasons.

But appellant was not in a position to interpose this defense in the *scire facias* proceeding. In the case of *Carpenter v. Mooers*, 26 Ill. 162, it was held that such an action is a proceeding *in rem*,

Henderson v. Palmer.

and no defense can be interposed to it, except payment, discharge, release or satisfaction, or that the mortgage never had, for some reason, become a valid lien. Nor can usury be set up in such an action. Nor is a plea of *non est factum* a proper plea. *Johnston v. The People*, 31 Ill. 469. And in the case of *Fitzgerald v. Forristal*, 48 Ill. 228, it was held that a want of consideration could not be pleaded in such a proceeding. It, then, follows that if a want of consideration cannot be set up, the nature and character of the consideration cannot, and hence the appellant could not show in the proceeding to foreclose by *scire facias* that the consideration for the note and mortgage was corrupt and illegal. Hence she has been guilty of no *laches* in failing to make her defense in that proceeding. Nor has the property passed into the hands of *bona fide* purchasers without notice. Thomas purchased as the attorney and for the use of Palmer, and still holds the premises. It then follows that there is no impediment to a court of equity affording the relief sought.

This the court below should have done, and for the error in refusing the relief and dismissing the bill, the decree of the court below is reversed and the cause remanded.

Decree reversed.

SCOTT, J., and SHELTON, J., dissenting.

NOTE.—In *Buck v. First National Bank* (27 Mich. 298), 15 Am. Rep. 189, a note given to one who had been robbed, in consideration of his promise to petition the court to mitigate the punishment of the felon, was held void as against public policy.

So in *Peed v. McKee* (42 Iowa, 689), 20 Am. Rep. 631, a mortgage executed in settlement for money embezzled by the mortgagor's son, and in consideration of an agreement that the son should not be prosecuted, was held void. On the other hand, in *Bibb v. Hitchcock* (49 Ala. 468), 20 Am. Rep. 288, a clerk in a post-office having embezzled funds for which the postmaster was liable, the latter to secure himself induced the clerk to give him a note with surety, agreeing not to prosecute criminally for the embezzlement. The note was held to be valid and the surety liable; but expressly on the ground of the obligation of the clerk to make good to the postmaster the money embezzled — the agreement not to prosecute being conceded to be illegal.

The correctness of this decision is open to serious doubt. The agreement not to prosecute criminally was *in fact* a part of the consideration on which the note was given, and it is well settled that a note given *in part* to suppress a prosecution is void even if for a just debt. *Bowen v. Buck*, 2 Williams, 308; *Murphy v. Bottomer*, 40 Mo. 67; *Brown v. Padgett*, 36 Ga. 609.

Contracts to suppress evidence or to interfere in any way with the course of justice, whether within the terms of any statute or not, are against public policy and void. *Nerot v. Wallace*, 8 T. R. 17; *Coppock v. Bower*, 4 M. & W. 361

 St. Louis, Jacksonville and Chicago Railroad Company v. Mathers.

Swan v. Chandler, 8 B. Monr. 97; *Clark v. Ricker*, 14 N. H. 44; *Commonwealth v. Johnson*, 8 Cush. 454; *Gardner v. Macey*, 9 B. Monr. 90; *Hinesburgh v. Sumner*, 9 Vt. 23; *Soule v. Bonney*, 87 Me. 128; *Porter v. Havens*, 87 Barb. 343.

But a contract or note to compound a private misdemeanor, such as a suit for slander or bastardy proceedings, is good. *Wallbridge v. Arnold*, 21 Conn. 434; *Merrill v. Fleming*, 42 Ala. 234; *Clark v. Ricker*, 14 N. H. 44. So is a note given after conviction for the legal costs and expenses of the prosecution. *Besley v. Wingfield*, 11 East, 46; *Kirk v. Strickwood*, 4 B. & Ad. 421; *Baker v. Townsend*, 1 J. B. Moore, 120. See, also, *Bell v. Wood*, 1 Bay 249; *Cameron v. McFarland*, 2 Car. Law Repos. 415; *Corley v. Williams*, 1 Bailey, 588; *Ford v. Cratty*, 52 Ill. 313; *Kelr v. Leeman*, 6 Q. B. 308, where the authorities are fully reviewed.

When a man accused his cashier of stealing money, and the cashier acknowledged that he had, and gave a note with an indorsement and a mortgage for the amount; and no prosecution was instituted nor any agreement made not to prosecute, the note was held valid. *Catlin v. Henton*, 9 Wis. 476, and see *Reg. v. Daly*, 9 C. & P. 342.

It has been held that to receive a note signed by a person guilty of larceny as a consideration for not prosecuting him is compounding a crime and indictable. *Commonwealth v. Pease*, 16 Mass. 91; 1 Camp. 45; 2 M. & S. 201. But merely taking back one's goods which have been stolen, or receiving reparation without agreement not to prosecute, or otherwise interfere with the course of justice, is no offense. *Reg. v. Stone*, 4 C. & P. 379; 1 How. P. O. 59; *Plumer v. Smith*, 5 N. H. 553.—RER.

 ST. LOUIS, JACKSONVILLE AND CHICAGO RAILROAD COMPANY V. MATHERS.

(71 Ill. 532.)

Railroad — agreement limiting location of stations — illegal contract.

Land was conveyed to a railroad company on condition that it should build no stations within three miles of a certain place. *Held*, that the condition was against public policy and void, and that the vendor was not entitled to relief for a breach thereof.*

BILLS in equity to compel the reconveyance of land. In 1860 the complainant, John Mathers, and others conveyed 200 lots in the town of Ashland to trustees, for and in consideration of \$1 and the benefits to be derived from the construction of the Tonic and Petersburg Railroad.

* See same principle, *St. Joseph & Denver City R.R. v. Ryan*, 15 Am. Rep. 337; S. C., 11 Kana. 603; *Marsh v. Fairburg, etc., R. R. Co.*, 16 Am. Rep. 504 S. C., 64 Ill. 414.

St. Louis, Jacksonville and Chicago Railroad Company v. Mathera.

Prior to such conveyance, and in view thereof, the board of directors of said railroad adopted the following:

“WHEREAS, some of the proprietors of the towns of Sinclair, Yatesville, Ashland and Tallula, located on the line of the Tonica and Petersburg Railroad, propose donating a number of lots in said towns for the purpose of aiding in the completion of said road from Jacksonville to Petersburg; and,

“WHEREAS, said parties are not willing to make such donations unless the board of directors will agree that no depot or station shall be established on the line of said road in less than three miles of each of said towns; therefore, be it

“Resolved, That this company will accept such donations upon the express condition, that, provided such donations be made, no depot or station shall be established within three miles of either of said towns, on the line of the said Tonica and Petersburg Railroad.”

In October, 1862, the Tonica and Petersburg Railroad Company and the Jacksonville, Alton and St. Louis Railroad Company were consolidated, and the appellant, the St. Louis, Jacksonville and Chicago Railroad Company, was thereby created a corporation, and invested with the franchises and other property of both companies, and assumed all debts and liabilities of the former company. This consolidation was fully legalized by an act of the legislature approved February 13, 1863.

Complainant's bill alleged the foregoing facts and the violation of the condition on which the said conveyance was made, to wit, not to build stations within three miles of Ashland, and that complainant had acquired all the interest of his co-grantors in the said lots. The bill demanded that the said lots be reconveyed to complainant and that defendant pay damages sustained by reason of a failure to perform.

Defendant filed a cross-bill for a decree that the lots be sold to pay defendant's indebtedness.

The court below decreed in favor of complainant, and defendant appealed.

Dummer & Brown, for appellant.

Morrison & Whitlock, for appellee.

SCHOLFIELD, J. The deed for the property, which is the subject of this litigation, professes, upon its face, to have been executed in

St. Louis, Jacksonville and Chicago Railroad Company v. Mathers.

consideration of the benefits to be derived by the grantors from the construction of the Tonica and Petersburg railroad, and of \$1. It purports to invest the trustees therein named, and their successors, with the fee simple title to the property, which is to be sold and conveyed by them "at either public or private sale, in such parcels, at such times and upon such terms as to them shall seem meet." It will be observed that there is nothing in the language of the deed, nor in anywise connected with the title of record, whereby a *bona fide* purchaser from the trustees would have been charged with constructive notice of the condition subsequent upon which is now claimed the deed was executed, and that the relief sought is based upon evidence of facts entirely independent of the deed.

Under these circumstances, the burden was upon appellee to show such facts as render it inequitable for the title to remain where it was vested by the operation of the deed, and, until this was done, the appellant was justified in relying alone upon the deed.

The contract with the board of directors of the Tonica and Petersburg Railroad Company, which is alleged to have been the real and only consideration for the execution of the deed, is in the nature of a condition subsequent. At the time the preamble and resolution of the board of directors, which constitute the alleged contract, were adopted, as well as at the time the deed was executed, the road was not completed, nor were all of its depots and stations established. The condition that no depot or station shall be established within three miles of either of said towns, on the line of said road, is unlimited in point of time, and, if valid, might be enforced as readily after the expiration of fifty years as one year. There is no evidence of fraud or mistake, the proof showing that the deed was drawn by appellee, and that the condition stated in the preamble and resolution of the board of directors was purposely omitted from the deed by the request of the secretary of the company; and the only ground upon which the relief prayed is asked, is, the failure of the railroad company to observe the condition in the preamble and resolution.

In the view that we take of this case, we do not deem it necessary to discuss whether the evidence introduced for the purpose of showing a different consideration from that expressed in the deed should have been excluded for the reason that it tended to affect

St. Louis, Jacksonville and Chicago Railroad Company v. Mathers.

the validity of the deed, as we think the evidence was clearly inadmissible upon another ground.

The validity of a condition subsequent depends upon its being such as the law will allow to divest an estate, for if the law deems the condition void as against its own policy, then the estate will be absolute and free from the condition. 1 Story's Equity, § 238; 4 Kent's Com. (8th ed.) 134; 1 Washburn on Real Estate (2d ed.), 469.

Nor is the rule different if we shall regard this as a proceeding to require a re-conveyance of the property, on account of a want or failure of consideration. A court of equity will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of doing that which is illegal; and where such a contract has been executed by one of the parties by conveying real estate, a court of equity will not, in general, interfere, but will leave the title to the property where the parties have placed it. *Swain v. Bussell*, 10 Ind. 438; *Inhabitants, etc. v. Eaton*, 11 Mass. 368; *Hoover v. Pierce*, 26 Miss. 627; *Cushwa v. Cushwa*, 5 Md. 44; *White v. Hunter*, 3 Fost. 128; *Murphy v. Hubert*, 4 Harris, 50; *Barton v. Morris*, 15 Ohio, 408; *Wright v. Wright*, 1 Litt. 179.

It is said, in 1 Story's Equity, § 296 a: "But where a party to an illegal or immoral contract comes himself to be relieved from that contract, or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to; and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints which are contaminated with the original immoral purpose; for if he sets up, as a ground of relief, the non-fulfillment of the illegal contract on the other side, and thereby he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and, therefore, the court will refuse it."

The alleged agreement or condition, on account of the non-performance of which relief is here sought, was, that a railroad company, chartered by an act of the legislature, and invested with the power of condemning private property, upon the ground that its road is for the public use, shall not establish a depot or station within three miles of Ashland. It cannot be pretended, for a moment, that the board of directors had authority to make such an agreement or condition. They were trustees both for the public and

St. Louis, Jacksonville and Chicago Railroad Company v. Mathers.

the stockholders of the company, and in the discharge of their two-fold duty were required to act with reference to the public convenience on the one hand, and the private interests of the stockholders upon the other. Between these there was no conflict, for the greater the local conveniences for the use of the road by the public, the greater would be its local business, and, of consequence, the profits of the stockholders. The interest, therefore, both of the stockholders and the public, forbid that there should be a positive prohibition against the establishing of stations at any points on the line of the road. Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established there, and no contract between a board of directors and individuals can be allowed to prohibit it.

If the present contract could be sustained, then, upon the same principle, a board of directors, and individuals desiring to remove all competition in the sale of town lots, might contract so that upon the entire line of a great railway there would be no stations, save where the parties contracting should be interested in the sale of town lots ; and thus practically exclude the mass of the public from any beneficial use of the road.

In *Bestor v. Wathen*, 60 Ill. 138, a contract between the officers of a railroad company and certain private parties, to secure the location of a railroad at a particular point, was held void, as being contrary to public policy, and not susceptible of being enforced in a court of equity. It was there said : " When the people, through the legislature, grant to a company the right of eminent domain for the purpose of constructing a railway, the grant is made because it is supposed the road will bring certain benefits to the public. When the company is incorporated, and subscriptions are made to the stock, the money is subscribed upon the understanding that the officers intrusted with the construction of the road will so locate its line and establish its depots as to bring the highest pecuniary profit to the stockholders, compatible with a proper regard to the public convenience. These, and these alone, are the considerations which should control the action of the president and directors of the road, and so far as they permit their official action to be swayed by their private interests, they are guilty of a breach of trust toward the stockholders, and of a breach of duty to the public at

St. Louis, Jacksonville and Chicago Railroad Company v. Mathera.

large. A court of equity will not enforce a contract resting upon such official delinquency, or even tending to produce it."

Appellee stands *in pari delicto* with the board of directors, so far as this agreement or condition is concerned. He voluntarily, according to his own showing, contracted for this "breach of trust toward the stockholders of the railroad company, and breach of duty to the public at large." Their loss was to be his gain. He was willing, at whatever expense it might be to others, to purchase a monopoly whereby to enrich himself, and having failed to accomplish his purpose, now asks a court of equity to reinstate him in the condition he was before entering into this unlawful combination.

The case presents no facts or circumstances meriting the consideration of a court of equity.

We perceive, however, no end to be subserved by the cross-bill. By the consolidation the appellant occupies precisely the same relation to this property that the Tonica and Petersburg Railroad Company did before the consolidation. There is no ambiguity in the language employed to express the trust, and no disposition is shown on the part of the trustees to refuse to execute it. It would undoubtedly have been competent either for the bondholders or the railroad company to have required the trustees to sell the property and apply the proceeds to the payment of the debts remaining due after the 1st of November, 1861, which are designated in the declaration of trust; but it was equally within their power to waive this and look to some other source for the necessary means to make such payment. This was done. No such indebtedness as is therein mentioned is now in existence. No express authority is given to apply the proceeds arising from the sale of the property to reimburse others for the payment of the debts therein indicated, and no reason is apparent to us why we should imply authority for that purpose. We are, therefore, of opinion that the appellant is not entitled to be reimbursed for the payment it has made from this source; and that it is the duty of the trustees to apply the proceeds to arise from the sale of this property "to the erection or improvement of station-houses, or other edifice or edifices, of the appellant, within the town of Ashland, as directed by the declaration of trust; but that this should be done under the direction of the appellant, through its proper officers.

The decree of the court below is reversed.

Decree reversed.

MERRITT V. YATES.

(71 Ill. 693.)

Deed — certificate of acknowledgment — blanks in — amendment of.

The certificate of acknowledgment to a deed executed by a husband and wife certifies, in the usual form, that the grantors, naming them, personally appeared and acknowledged the deed and then continued: "And the said _____, wife of said _____, having been by me examined, separate and apart," etc., acknowledged it, following the prescribed form. *Held*, (1) that the certificate was insufficient, and that the deed could not be read in evidence; and (2) that the certifying officer could not afterward amend the certificate.

ERROR to the Circuit Court of Champaign county. The original report gives no information as to the nature of the action.

Cunningham & Webber, for plaintiff in error.

E. L. Sweet, for defendant in error.

WALKER, J. Plaintiff below having introduced evidence to maintain her title, defendant introduced and read in evidence a deed from her to him for the same premises, to the reading of which plaintiff excepted, on the ground that it was insufficiently acknowledged to pass plaintiff's title, she being a married woman, and the owner of the premises when the deed was executed. The objection is urged in this court as a ground for reversal. This is the certificate of acknowledgment to which objection is made:

"I, Jackson Lewis, a justice of the peace in and for said county, in the State aforesaid, do hereby certify that Susan Merritt and James Merritt, her husband, personally known to me as the same persons whose names are subscribed to the annexed deed, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument in writing, as their free and voluntary act, for the uses and purposes therein set forth.

"And the said ———, wife of the said ———, having been by me examined, separate and apart, and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me fully made known and explained to her, and she also by me being fully informed of her rights under the homestead laws of this State, acknowledged that she had freely and

Merritt v. Yates.

voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, and also all her rights and advantages under and by virtue of all laws of this State relating to the exemption of homesteads, without compulsion of her said husband, and that she do— not wish to retract the same. Given under my hand and — seal, this 7th day of December, A. D. 18—.”

According to the authority of the cases of *Tully v. Davis*, 30 Ill. 103; *Gove v. Cather*, 23 id. 634; and *Owen v. Robbins*, 19 id. 545, this acknowledgment was insufficient to pass plaintiff's title. The last paragraph of the certificate does not state who, or whose wife, was made acquainted with the contents of the deed and privily acknowledged the same. Nor does it state who was the husband. But it is urged that mere grammatical inaccuracy should not vitiate. That is no doubt true; no matter how ungrammatical the language, so that it can be clearly seen what is intended to be expressed. But that must appear without mere inference or conjecture. Had the justice said the parties appeared and acknowledged the deed, we might conjecture that it was the grantor or the grantee, but the acknowledgment would not so state, either grammatically or ungrammatically. In such a case it might be conjectured that the officer was well qualified to discharge this and every other duty, and that he was careful and painstaking in the discharge of his duty; but even if that were proved, it would not make such a certificate as is required by the statute, and we presume that no one would contend that such an acknowledgment would be sufficient. On principle and in fact, in what consists the difference, if substance is considered?

Whilst many of the forms and ceremonies anciently required in alienations have been dispensed with, still we have not yet reached the point where all substance may be omitted in instruments transferring title to real estate. As land has become more a matter of commerce, the forms of conveyances have been simplified and cheapened, but still reasonable certainty of description of persons and property to be affected must appear. It must be certain that the persons executing acknowledged the deed, and that the *femme covert* who joins in the deed acknowledged its execution, and not that she executed the deed, and some other *femme covert* had it explained to her, and acknowledged that she relinquished her dower or conveyed her estate.

It is also contended that the subsequent certificate, written by the

justice of the peace on the deed some years after the first was made, cured the defective certificate, although the deed was not re-acknowledged. We have been referred to no precedent for such action and we would confidently expect that none could be found. Anciently, such acknowledgments could only be taken in open court, and entered on the records of the court in proceedings tedious, expensive and incumbered with much form. It was at that time regarded of too much moment to be left to the loose and uncertain action of unskillful persons, and the title to property held by married women was guarded with such care as only to permit it to be divested by the judgment of a court of record. Justices of the peace, and the other enumerated officers, have, however, under our laws, been intrusted with the power to take and certify such acknowledgments, and when in conformity with the statute, the act is clothed with the same force and effect that was anciently produced by the judgment of a court of record.

It is said that courts of record permit amendments to their records — sheriffs to amend their returns, and compel officers by *mandamus* to perform legal duties. There is no rule more rigidly enforced, than that the opposite party must have notice in all cases of amendments of records in matters of substance, and the amendment here is of the very essence of the conveyance itself. And it is true that the court, in a proper case, and on notice to the opposite party, will permit the sheriff to amend his return. *O'Conner v. Wilson*, 57 Ill. 226. But we are aware of no statute or common law practice which authorizes or in any manner sanctions the right of justices of the peace to amend their records after they have once been made. To allow a justice to make alterations and changes in his record, at will and according to his whim, would be fraught with evil and wrong that would be oppressive. Such a power has not been intrusted to the higher courts, and cannot be exercised by these inferior jurisdictions.

The case supposed of compelling a justice of the peace, who refuses to make any certificate of an acknowledgment by *mandamus*, is not parallel to this case. Here, the justice of the peace, at the time, granted his certificate, and it imports verity. We do not concede that the Circuit Court has power to compel a justice of the peace by *mandamus* to correct a judgment when entered by mistake, for too large or too small a sum, or to correct a certificate of acknowledgment in which a mistake has occurred. Such a pro-

King v. Fleming.

cess cannot be used to correct judgments of inferior courts, and the acknowledgment and certificate take the place of the judgment of former times and import verity, and cannot be contradicted any more than can a judgment.

It may be that the carelessness of the justice has produced hardship and wrong, but that is not a ground for violating rules that have governed the purchase and sale of real estate from the organization of our State. The defendant must be left to his action against the justice, or on the covenants in the deed, or any other remedy he may have in law or in equity.

The deed was improperly read in evidence, and the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

KING v. FLEMING.

(13 Ill. 21.)

Sunday — note executed on — delivery.

A promissory note was signed on Sunday, but not delivered until Monday
Held valid.

ACTION on a promissory note. The opinion states the case.
Appeal from the Circuit Court of Vermilion county; the Hon. JAMES STEELE, Judge, presiding.

E. S. Terry, for appellant.

William H. Mallory, for appellee.

SCOTT, J. This action was brought on a promissory note made in the State of Indiana. The defense urged is, it was executed on Sunday, and by the laws of that State it is made unlawful to engage "in common labor" or "usual avocations, works of charity or necessity only excepted." Hence it is insisted the note is void.

The testimony shows the note was written sometime during the week prior to the day it bears date. It was, in fact, signed by appellant on Sunday, but not delivered to appellee until Monday.

King v. Fleming.

There is no evidence as to when the other maker signed his name. In the absence of proof, it will be presumed it was done on a day when it was lawful to do secular labor. It is proven appellee had no knowledge, when he received the note, it had been executed on Sunday by either maker.

In *Reynolds v. Stevenson*, 4 Ind. 619, it was held, the making of a promissory note on Sunday was "common labor," within the meaning of the statute of that State which forbids the transaction of all secular business on Sunday.

A replevin bond executed on Sunday was declared to be void, its execution being in violation of the statute which forbids "common labor" on that day. *Link v. Clemmens*, 7 Blackf. 479.

In a later decision of that court, it was declared a sale of goods made on Sunday was void, as being against the statute, yet it was held the parties, by subsequently acting upon the contract as a valid and subsisting agreement, might ratify it, on the principle that contracts made on Sunday form an exception to the general rule that void contracts are not susceptible of ratification. *Banks v. Werts*, 13 Ind. 203 ; *Adams v. Gay*, 19 Vt. 358.

In *Love v. Wells*, 25 Ind. 503, it was held a deed, though signed and acknowledged on Sunday, if delivered on another day, is valid, whatever may be the effect on the acknowledgment, for the reason it did not take effect as a deed until after delivery.

The execution of a promissory note is not complete until it is delivered to the payee, or some one for him. The decisions seem to be, promissory notes will not be void, though signed on Sunday, if delivered on another day. The principle is, such contracts are not tainted with any general illegality, but are illegal only as to the time in which they are entered into. It is not sufficient to avoid them, that they may have grown out of a transaction on Sunday. They must be finally closed on that day.

The weight of authority seems to be, although such contracts be entirely closed up on Sunday, yet, if ratified by the parties upon subsequent day, they are valid. *Adams v. Gay*, *supra* ; *Commonwealth v. Kendig*, 2 Penn. St. 448 ; *Clough v. Davis*, 9 N. H. 500 ; *Hilton v. Houghton*, 35 Me. 143 ; *Lovejoy v. Whipple*, 18 Vt. 379.

In the case at bar, the note, though signed by one of the makers on Sunday, was delivered to the payee on Monday, the day it bears date. The payee was ignorant of the fact the note had been signed on Sunday. The delivery was made by one of the makers. This

Starkweather v. The American Bible Society.

was a subsequent ratification, and brings the case clearly within the principles of the cases cited.

It is objected appellant did not himself deliver the note; that parol authority to deliver it upon another day is within the statute, and, therefore, void.

The case, in our judgment, is not affected by the principle insisted upon. In this instance, the note was delivered by one of the makers, in pursuance of an arrangement previously made, upon a day on which it was lawful to perform "common labor."

Although the note was signed by one of the makers on Sunday, it was within their control until Monday, when it was delivered to the payee. The possession of one of the joint makers must be regarded as the possession of both.

No error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

STARKWEATHER V. THE AMERICAN BIBLE SOCIETY.

(TS III. 59.)

Foreign corporation — devise to — conflict of laws — ex ptes

A corporation which cannot take real estate by devise in the State where it was incorporated cannot take by devise in another State.

Where real estate is devised to a corporation which has no authority to take by devise, a court of equity has no power to convert such real estate into money and direct the payment thereof to such corporation.

BILL in equity to establish the appellee's title to real estate. The opinion states the facts.

Miller & Frost, for appellants.

Lawrence, Winston, Campbell & Lawrence, for appellee.

WALKER, J. Appellants, as devisees and heirs at law of Charles R. Starkweather, deceased, filed their bill in the Circuit Court of Cook county, to establish their title to the real estate owned by testator in his life-time under what is known as the "Burnt Record Statute," and, amongst others, the American Bible Society was made a defendant. The society appeared and claimed an interest

in the property under the fifth clause in his will. Its right was contested, and the court below rendered a *pro forma* decree in favor of the Bible Society, to reverse which this appeal is prosecuted.

There is no question raised as to the proper execution and probate of the will, nor is it disputed that the will contained a devise of the interest claimed by appellee. The clause in the will is this: "I give and bequeath to the trustees of the American Bible Society, established in 1816, an undivided eighth of my estate, to have and to hold the same for the use of said society; provided, that said Bible Society is not to be entitled to the same, or to the income of the same, till my youngest child becomes of age."

The society was incorporated by a statute of the State of New York, passed on the 25th of March, 1841, for the purpose of publishing and promoting the general circulation of the scriptures, without note or comment. It was vested by its charter with the powers granted to corporations in that State by their Revised Statutes, amongst which is this power: "To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." The Statute of Wills in that State, adopted in March, 1813, authorizes persons having real estate to devise the same to any person or persons, except bodies corporate and politic, by their last will and testament. Again, in 1822, in revising the statutes, it was provided that corporations might take, purchase and hold real estate, but it was declared that no devise to a corporation should be valid unless such corporation be expressly authorized by its charter to take by devise.

Thus it will be seen that the charter of this company does not prohibit it from taking property by devise, but the Statute of Wills does expressly declare that no devise to a corporation shall be valid unless such corporation is authorized by its charter or by statute to take in that manner. These provisions, thus found in different chapters of the statutes of New York, have given rise to litigation in that State to obtain a construction of these acts. The courts of last resort in New York have held that a devise to a corporation not thus expressly authorized to so take real estate in that State was void, and that such corporations have no power to so receive and hold real estate. See *Downing v. Marshall*, 23 N. Y. 366, *McCartee v. Orphan Asylum*, 7 Cow. 437. In these cases it was

Starkweather v. The American Bible Society.

held that these statutes must be regarded as being *in pari materia* and should be construed together, and we have seen the result at which their courts arrived.

At the common law it is believed that no such devise could be made, and the 32 Hen. 8, ch. 1, and the 34 Hen. 8, ch. 5, commonly called the Statute of Wills, gave power to every person having sole estates in fee of manors, etc., "to give, dispose, will or devise to any person or persons, except to bodies politic or corporate, by his last will and testament, such lands," etc. Thus it will be seen that New York adopted this enactment in substance, and the policy of these statutes was, undoubtedly, to prevent gifts to these bodies in mortmain. It is also said that "where the Statute of Wills excepts bodies politic as competent devisees, the usual power given to corporations by charter or act of incorporation to purchase lands, etc., has been construed not to qualify them to take by devise, the word 'purchase' being understood in its ordinary and not in its legal and technical sense." Angell & Ames on Corp. 111, and in support of the text they refer to *Jackson v. Hammond*, 2 Caines' Cases, 337; *McCartee v. Orphan Asylum*, *supra*; *Canal Co. v. Railroad Co.*, 4 Gill & Johns. 1, which sustain the rule.

We, then, find a corporation created and located in New York, incapable, by devise, of taking and holding real estate there, claiming to hold real estate here, devised to it by a citizen of this State. Appellee contends that the Statute of Wills in New York only operates as a disability upon all persons in that State to become devisors of real estate to this company, and that the charter does not prevent them from receiving lands in other States, by devise, from persons beyond the limits of the State, and hence this devise is valid and binding. We have seen that the courts of New York have held that such companies are not authorized to so take and hold property in that State; and if incapable of doing so there, how, it may be asked, can it exercise powers and discharge functions beyond the limits of that State which it is not capable of doing under the laws of the State which created and endowed it with its powers and functions? Such bodies have such powers only as are conferred upon them by the laws of the State in which they are created.

It does not matter whether this body is prohibited by its charter or by the Statute of Wills in New York from taking lands by devise. Whether the one or the other statute creates the disability, the effect is the same, as it goes to the power of so taking and holding.

Starkweather v. The American Bible Society.

When this body was incorporated, the Statute of Wills was in force, and the courts of New York hold that it controlled the powers of the company as though both provisions had been contained in the same enactment. If so, the disability is fundamental. It operated to create a corporation that might perform the acts and exercise the privileges conferred, but without power to receive lands by devise. Such a prohibition goes to the power of the body, as well as to persons disposed to devise lands to them. If, then, the corporation was created without power to so take, it is incapable of doing so, no matter where the devisor may reside or the lands are situated. The reasons operating on the legislature when they refused to endow this and other similar organizations with such capacity, grew out of considerations of sound public policy in thus preventing them from receiving and holding lands in mortmain — and this was effectually accomplished by their Statute of Wills.

We can perceive no difference whether the disability or prohibition is contained in the one or the other enactment, inasmuch as it operates on the body, as the New York courts hold, with the same effect and produces the same results. It carries out the policy of the State as effectually in the one mode as in the other, and goes to the power to thus take real estate, and operates as a prohibition and a want of power; and the power not existing in the body to so take, all such devises to it must be held ineffectual to pass title, without reference to where the devisor may reside or the lands may be situated.

We are aware that other courts of the highest respectability have held that the laws of New York cannot prevent this corporation from taking land out of that State by devise, so that the devisor does not reside there; but we are unable to concur with them in so holding, as we think the inhibition is fundamental, and goes to the power to thus receive real estate.

It may be said that the lands not being in New York, it can in nowise affect the policy of that State for the company to hold lands in another State. Such bodies can only exercise their privileges and functions in other States by permission, expressed or implied. When by implication, it is denominated comity between States. For such bodies to hold property or transact business in a State different from that of their creation, they must have such permission. This being so, New York has no power to create a body incapable of taking lands by devise in that State, and yet with power to do

Starkweather v. The American Bible Society.

so in a foreign jurisdiction. If their legislature was to so enact, and other States were to consent, then such bodies might, no doubt, so receive and hold lands ; but that legislature has not so enacted in this case, nor has our State so consented.

The will in this case was probated on the 16th day of September, 1867, and we are aware of no statute of our legislature, then in force, which authorized foreign corporations to hold lands, by devise, in the State.

In the case of *Carroll v. East St. Louis*, 67 Ill. 568, this court held, that a foreign corporation could not hold lands in this State, beyond what was reasonably necessary for the transaction of the business for which they were created ; that a corporation created in another State, for the purpose of buying and selling lands, could not come to this State and pursue the business for which the corporation was created ; that conveyance to it of lands in this State was void, and failed to pass title to the corporation. The inability was placed on the ground that it was opposed to the policy of this State, deduced from the course of its general legislation.

The principles there announced apply, with full force, to this case, as all of the inconveniences and injuries are as likely to ensue in this, and other cases like it, as in that. We, however, deem it unnecessary to repeat the reasons which led us to the conclusions announced in that case ; but we must hold, that case is conclusive of this. Then, whether this corporation is incapable of taking this land under the laws of New York or under the laws of this State, does not matter, as the result is the same. We, however, think the company is incapable of taking under either, nor does the purpose for which the corporation was created change the principle. It does not matter how commendable and beneficent the purpose of the organization may be, or what amount of benefit it is calculated to accomplish, the rules of law must have their proper application, leaving it to the general assembly, if necessary, to make a change.

It is, however, urged, that even if this devise is void the court may, and, nevertheless, should, carry out the intention of the deviser, by decreeing the sale of this real estate, and ordering the payment of the proceeds to appellee — that this is not only sanctioned but required by the former adjudications of this court.

In the case of *Heuser v. Harris*, 42 Ill. 425, a party had made a will, and had provided that his estate should be reduced to money, and then to be divided : one-half to the school district in which

Starkweather v. The American Bible Society.

his farm was situated, and the fund to be managed by a trustee, to be elected by the people of the district, for four years, to give security, and to perform the duties without compensation; the other half to the support of the poor of the county, but only the interest to be used. As in the one case it was impracticable to find a person who would take charge of the fund, and manage it for the use of schools of the district, and as to the other fund there were no trustees named, or any mode pointed out by which trustees might be obtained, the court held, that as these objects were within the language of the 43 Eliz., ch. 4, which was held to be in force in this State, there was power to execute the trust *cy pres*, and trustees were designated to carry out the provisions of the will. It was there said, in reference to the portion set apart for school purposes, the bequest was made to a corporation capable of taking it, and the mere instrument to control its application could be readily provided by a resort to a court of equity; and as to the fund bequeathed to the poor, the County Court was the proper donee of the fund, and could take and control it, as the trustee of the poor, in the mode prescribed by the will.

It will be observed that in that case there were donees capable of taking as trustees; but in this case, we have seen, the donee was incapable of taking and holding the property, for the want of legal ability. Again, in that case, there was no change of the fund, nor was it converted from one kind of property into another, but all that was done was to simply declare that the bequest should not be lost for the want of a trustee and that one might be appointed *cy pres*, to carry out the intention of the donor; but here we are asked to do more: to convert this real estate into money, and pay it to appellee.

A reference to the 43 Eliz., ch. 4, will show that all of the subjects intended to be embraced in that statute are embraced in the preamble; but corporations of the character of the Bible Society are not enumerated. It embraces "schools of learning, free schools, and scholarships in universities;" also, "aged, impotent and poor people." Hence, the fact that the 43 Eliz. may be in force in this State does not, by any means, confer the power claimed in this case, and it is believed that the doctrine of executing trusts *cy pres* had its origin in that enactment.

In the case of *The Trustees of the Philadelphia Baptist Association v. Hart's Ex'rs*, 4 Wheat. 1, Chief Justice MARSHALL. in de-

Starkweather v. The American Bible Society.

livering the opinion, has very fully examined into the grounds of Chancery jurisdiction in this country, and it is there held, that whatever may have been the power of the king, as *parens patriæ*, in England, or even of the Courts of Chancery, when acting under the authority of the royal prerogative and not in the exercise of their ordinary jurisdiction, in this country the validity of devises and bequests must be determined by well-defined legal rules and principles, and not by an arbitrary discretion or by unlimited power by the court, under the royal prerogative. He, in the opinion, says: "It is, perhaps, decisive of the question propounded to this court, to say that the plaintiffs cannot take" the property.

In the case of *Fontain v. Ravenel*, 17 How. 369, which involved a bequest of property to be appropriated by the executors of the testator to such charitable institutions in South Carolina and Pennsylvania as they might select and deem most beneficial to mankind, the executors died without naming the institutions, and before the time therefor had expired. It was held to be inoperative, and not capable of being enforced in the Circuit Court of the United States. In that case it was held that such charities were only executed in the English Court of Chancery, by virtue of power derived from the royal prerogative, and which was not inherent in the court as a court of equity under its ordinary jurisdiction. Chief Justice TANEY, in delivering the opinion of the court, lays down the doctrine, that the same rules that govern an ordinary trust, and determine its validity, apply to and determine the validity of a charitable trust, and that if the *cestui que trust* or beneficiary is incapable of maintaining a suit in equity to establish his claim in an ordinary case of trust, the same rule must be applied where charity is the object, and complainant claims to be recognized as one of its beneficiaries. The same doctrine is announced in the case of *Wheeler v. Smith*, 9 How. 55. Also, in the case of *Videl v. Girard's Ex'rs*, 2 id. 195, where the authorities are extensively reviewed.

In the case of *Williams v. Williams*, 8 N. Y. 542, the court says, that "the English doctrine is in force here only so far as it is adapted to our political condition. In that class of cases, therefore, where the gift is so indefinite that it cannot be executed by the court and where the purpose is illegal or impossible, the claims of the representatives of the donor must prevail over the charity. The reason is that we have no magistrate clothed with

Starkweather v. The American Bible Society.

the prerogatives of the crown, and our courts of justice are intrusted only with judicial authority." This we regard as the true doctrine, and the execution of trusts *cy pres* should be limited to the rule there announced, and the cases embraced in the 43 Elizabeth.

Where the trust is legal and is definite as to the person to whom the gift is made and the thing given, and only requires a trustee to carry out the purpose of the donor, then a court of equity may well act in preserving the trust fund from lapsing. The case of *Williams v. Williams*, *supra*, was followed in New York by the cases of *Beekman v. Bonsor*, 23 N. Y. 308, and *Bascom v. Albertson*, 34 id. 610, and they announce and apply the same rule.

We, however, are asked to go further in this case. We are urged to direct the sale of this real estate and pay appellee the proceeds. Why should we do so in favor of a charity of this character, when such relief is denied a natural person? If a man were to devise lands to a child, and it proved that he had no title to the property devised, could it be claimed that the court would carry out the intention of the deviser by decreeing to the devisee other property of equal value? We suppose no one would contend that simply because the deviser's intention had been unexpectedly defeated the court would, therefore, make a new will for the deviser, and give the devisee an equivalent of what was intended.

The testator, no doubt, intended to give this land to appellee, but the means employed failed to accomplish this purpose; but that does not clothe the court with power to give money or other property. The courts are so strict, that they will not permit the terms of a will to be altered, even when the deviser has, by mistake, misdescribed land in a devise by substituting that which could be clearly proved to have been intended. *Kurtz v. Hibner*, 55 Ill. 514; S. C., 8 Am. Rep. 665. Then why change the fund from land to money, when the testator intended to give land and not money? Why substitute something not donated, because something was intended to be donated but did not vest in the donee?

When the testator died, all of the real estate of which he died seized and which was intestate at once descended to and vested in his heirs; and as appellee was incapable of taking title to the real estate attempted to be devised, that became thereby intestate property, and descended to and the title vested in his heirs, as would any other intestate real estate. This being the case, we have no

Melvin v. Lisenby.

more power to order their property to be sold to satisfy this void devise, than that of any other person. Had there been beneficiaries capable of taking directly by devise, and had this case fallen within the statute of charitable uses, but the devise had failed simply for the want of a trustee, then the beneficiary would probably have taken an equitable title to the property devised. But here the beneficiaries are the whole world, to whom the bibles are to be distributed, and they are incapable of taking, and the corporation is incapacitated from taking, and hence, neither a legal nor equitable title has vested in either, but it has descended to the heirs of the testator. So that, in any view we have been able to take of the case, we fail to see any well-founded right that appellee has to the property or the proceeds of its sale.

The decree of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

SHELDON, J., dissents.

MELVIN V. LISENBY.

(12 Ill. 68.)

Municipal bonds — defective execution — restraining tax for.

A county was duly authorized by statute to issue bonds to be signed by certain officers, and countersigned by the treasurer. The bonds were issued without being so countersigned. *Held*, that a court of equity would not enjoin the collection of a tax levied for their payment.

BILL in equity by sundry citizens and tax payers of DeWitt county in behalf of themselves and all other tax payers in the county, to enjoin the collection of certain taxes extended on the collector's books by the county clerk, in pursuance of a certificate of the amount thereof from the auditor of public accounts, as being necessary to meet the interest on \$175,000 of bonds purporting to be those of DeWitt county, which had previously been registered in the office of the auditor, and to have the bonds declared null and void. The court below, by its decree, enjoined the collection of any taxes for the purpose of paying the interest or principal of the bonds, until they should be countersigned by the treasurer of the county.

Melvin v. Lisenby.

The defendants appealed. The only grounds which appellees' counsel, in their argument, rely upon in support of the bill and decree are :

1. That a majority of the legal voters living in DeWitt county were not in favor of the subscription, and that, therefore, the tax levied by the auditor under the Funding Act of April 16, 1869, is illegal.

2. That the bonds are invalid, because they are not countersigned by the treasurer of the county.

The act under which the bonds were issued provided that the chairman of the board of supervisors shall also execute to the company, in the name of the county, bonds for such subscription ; that the bonds shall be signed by such chairman and by the county clerk, attested by his official seal, and countersigned by the treasurer of the county.

Hay, Greene & Littler, for appellants.

Weldon & Benjamin, for appellees.

SHELDON, J. [After deciding the first ground relied upon in the appeal.*]

As respects the second point, that the bonds are not countersigned by the treasurer of the county, it is the case of the defective execution of an instrument.

The county of DeWitt by its authorized agent, in pursuance of a vote of the people of the county, made a contract of subscription of \$175,000 to the capital stock of this railroad company. In attempted execution of the contract, the bonds in question were issued. They were signed by the chairman of the board of supervisors and by the county clerk, and attested by the official seal of the latter, and were delivered to and accepted by the railroad company, as in completion of the contract for subscription, and in

*The act under which the bonds were issued providing that, "If it shall appear that a majority of all the legal voters of such counties, cities, incorporated towns or townships voting at such election, have voted for subscription, it shall be the duty of the County Court, or chairman of the board of supervisors of such county," etc., "to subscribe to the capital stock of said railroad company," etc. The court held that the presumption is that the votes cast at an election held according to law is the vote of the whole number of legal voters. As this point has been frequently adjudicated, we do not include that portion of the opinion. *People v. Warfield*, 20 Ill. 159; *People v. Garner*, 47 id. 246; *People v. Wiant*, 48 id. 263; *St. Joseph Township v. Rogers*, 18 Wall. 644; *County of Cass v. Johnson* (Sup. Ct. U. S., 1877). 16 Alb. L. J., overruling to that extent, *Harshman v. Bates County*, 29 U. S. 509.

Melvin v. Lisenby.

payment for the stock subscribed for. The bonds were negotiated by the company for full value before the suit was instituted. But the bonds are not countersigned by the treasurer, as they are required to be by the act authorizing the subscription. In that circumstance they lack in complete execution.. For aught that appears it was an accidental and unintentional omission.

To grant the relief asked for by the bill in such case would seem to be to reverse the accustomed action of a court of equity. It is the especial province of such courts to enforce the specific performance of agreements, to aid and correct defects or mistakes in the execution of instruments and powers. It is a maxim that equity looks upon that as done which ought to have been done — the true meaning of which is that equity will treat the subject-matter, as to all collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as the parties might have executed them. 1 Story's Eq. Jur., § 64, g.

The important thing here was the authorizing of the subscription by a vote. That having been done, what followed to be done consisted in duties which the act prescribed to be performed by certain officers of the county, and the countersigning by the treasurer would seem to be the least essential of the prescribed circumstances of the execution of the bonds. It was but the signing, as a subordinate officer, a writing signed by a principal or superior, to attest the authenticity of the writing. The statute did not make the bonds void if not countersigned by the treasurer.

The supplying of such a defective circumstance in the execution of an instrument or power would, in the absence of a remedy at law, be within the ordinary remedial power of a court of equity.

The court is called upon here not to aid in the defective execution of these bonds, and interpose in their support, but it is asked to lend its aid to enable advantage to be taken of this defect of execution of the instruments in defect of the execution of a fair agreement, and to prevent the enjoyment of a benefit, which might be derivable from the bonds in the condition they now are. The relief sought appears to us to be in opposition to all the cardinal principles of the exercise of equity jurisdiction.

It is a different question from the one whether an action at law would be maintainable on the bonds.

We are of opinion that the appellees do not stand upon a ground

Sebastian v. Johnson.

of superiority which entitles them to come into a court of equity for relief, and that there is a countervailing equity on the other side to induce a court of equity to remain passive.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

BREESE, J., and McALLISTER, J., dissent on the ground that the statute having prescribed a particular mode to be pursued by the municipal officers in the execution of the bonds, it impliedly prohibits any other mode. The doctrine of aiding the defective execution of the power has no application to a power conferred by statute on public officers, and equity will follow the law.

SEBASTIAN V. JOHNSON.

(13 ILL. 282.)

Administrator's sale — by whom to be made — sale by auctioneer.

Where an administrator is authorized by a decree of court to sell land for the payment of debts, the sale must be made by him personally or by his agent in his presence. If made by an auctioneer in the absence of the administrator it is not valid. (*See note, p. 145.*)

BILL to compel the conveyance of land. The opinion states the case.

Randle, Gillespie & Happy, for appellant.

Dale & Burnett, for appellee.

SHELDON, J. This was a bill in Chancery against an administratrix to compel the conveyance of land purchased at an administratrix's sale.

The court below, on hearing, dismissed the bill, and the complainant appealed.

The sale was not made in accordance with law. It was made under an order of the County Court directing the sale of the land by the administratrix for the payment of the debts of the intestate.

Sebastian v. Johnson.

The sale was not made by the administratrix herself, but it was made by one Bonner, whom the administratrix had engaged for that purpose, she not being present at the sale, being sick at the time. The authority given to the administratrix to make the sale was a personal trust which she could not delegate to another. If she had been present, and had employed an auctioneer or crier to assist in the making of the sale, it would have been her sale, and the parties in interest would have had the benefit of her superintendence and judgment. But such a sale made by another person, without the administratrix being present at all to exercise control over it, cannot meet judicial sanction. *Taylor v. Hopkins*, 40 Ill. 442; 2 Williams on Executors, 944; *Berger v. Duff*, 4 Johns. Ch. 368; *Heyer v. Deaves*, 2 id. 154. In the last case, which was that of a sale of mortgaged premises under a decree, the master being sick did not attend the sale, but deputed a competent agent, who attended and sold the land; the sale was set aside for that reason solely, there being no other objection to the fairness and regularity of the sale.

[The remainder of the opinion was not important.]

Decree affirmed.

NOTE.—Judicial sales must be conducted by the person designated in the decree or under his immediate direction. *Blossom v. Railroad*, 3 Wall. 205; *Reynolds v. Wilson*, 15 Ill. 394; *Williamson v. Berry*, 8 How. (U. S.) 495, 544; *Blakely v. Abert*, 1 Dana, 185. "Such sales," said the court in *Blossom v. Railroad*, "must be made by the person designated in the decree or under his immediate direction and supervision, but he may employ an auctioneer to conduct the sale if it be made in his presence."

Where a power of sale is given to executors, they cannot sell by attorney. *Newton v. Bronson*, 13 N. Y. 587; *Hawley v. James*, 5 Paige, 487; Sudg. Powers, 222 (6th ed.); *Williams v. Mattocks*, 3 Vt. 189; *Floyd v. Johnson*, 2 Litt. 109; See *Neal v. Pullen*, 47 Ga. 78. A sale executed by a delegated agent is void. *Pearson v. Jamison*, 1 McLean, 197. All the executors who qualify must join in executing the power of sale. *Shelton v. Homer*, 5 Metc. 466; *Hulbert v. Grant*, 4 T. B. Monr. 580; *Bank v. Baugh*, 9 Sm. & M. 290; *Kling v. Hummer*, 2 Penn. 349. But if one executor is removed (*Matter of Bull*, 45 Barb. 334), or is relieved of his trust (*Matter of Croseman*, 20 How. Pr. 350; *Gould v. Mather*, 104 Mass. 283), or dies (*Chandler v. Rider*, 102 Mass. 270), the remaining or surviving executor may exercise the power unless it clearly appear from the will that a joint exercise thereof was intended.

But trustees for sale may employ an agent according to the usage of business if they use proper prudence. *Ord v. Noel*, 5 Mad. 498; *Sinclair v. Jackson*, 8 Cow. 582; *Gilliepie v. Smith*, 29 Ill. 473. But such agent should only be intrusted with details of the sale, the trustees keeping the business in their own hands and executing the deed. *Hawley v. James*, 5 Paige, 487; *Oranston v. Crane*, 97 Mass. 459.

SHANNON V. HALL.

(73 Ill. 384.)

Deed — registry of — destruction of record.

Where a deed or mortgage is once duly recorded, it is thenceforth notice to all the world even though the record be totally destroyed.

A mortgagee recorded his mortgage. The records were afterward destroyed by fire, and a statute was passed, providing for their restoration, but the mortgagee took no steps to restore his record. Afterward the mortgagor conveyed to a *bona fide* purchaser without notice of the mortgage. *Held*, that the purchaser took the land subject to the mortgage.

BILL in equity to foreclose a mortgage. The opinion states the case.

Bell & Green, for plaintiffs in error.

S. Z. Landes, for defendants in error.

BREESB, J. This was a bill in equity, in the Wabash Circuit Court, exhibited at the April term, 1871, by Albert R. Shannon and James R. Webb, executors of the last will and testament of Samuel D. Ready, deceased, to foreclose a mortgage on certain lots in the town of Mt. Carmel, executed by one William T. Page to Ready, in his life-time.

Page was brought in by publication, and the other defendants appeared and answered. At this stage of the proceedings, it was agreed between the parties that the answers should be considered as if sworn to by all the defendants; that, in addition to the bill, answer, exhibits and replications, the following shall be taken as all the facts proved on the hearing and considered by the court: That the principal of the note and the interest accrued since November 1, 1865, are unpaid, the interest having been paid annually by Page to that time; that the mortgage in question was executed, acknowledged and recorded as alleged; that all of the deed and mortgage records were destroyed by fire when the courthouse was burned, April 7, 1857, and that the mortgage was not afterward recorded; that Hall purchased and paid for the premises without any information or knowledge of the existence of the mortgage, and that those claiming under him purchased without

Shannon v. Hall.

notice ; that a commission was held under the act referred to for about nineteen months, and that Ready knew, in the summer of 1865, that Hall was in possession of the mortgaged premises, claiming to have perfect title to the same.

The court, on this state of facts, found the equities to be with the defendants, and dismissed the bill of complaint with costs.

To reverse this decree, the complainants bring the record here by writ of error, relying, for a reversal, upon the fact that the mortgage was duly recorded, and was notice to all persons, and though the record was subsequently destroyed by fire, still Hall and all others were affected by it. They insist that, inasmuch as Ready, their testator, had, in due time, placed the mortgage on record, he had done all the law required, and that from that day all persons are presumed to have notice thereof ; and they further insist that the destruction of the record by fire destroyed none of his rights, and that, although a law was passed by the general assembly to restore the records so burnt and destroyed, he was under no obligation to incur the trouble and expense of its restoration, and claim that the deed, when filed for record and recorded, was notice to all the world from the time of filing the same.

On the other side, it is insisted, as the note, to secure which the mortgage was executed, matured eighteen years before Hall purchased from Page, and twenty-two years before Hall sold to the Fredericks and Webert, twenty-four years before the defendants Ridgway and Kreider purchased from Fredericks and Webert, and more than twenty-five years before the commencement of this suit, and the public records showing no incumbrance on the premises, and as they all purchased in good faith paying a valuable consideration, without any notice, actual or constructive, of any incumbrance, although the deed had been actually recorded in due time, the record of which had been destroyed by fire, still, as they purchased fairly and without notice, an equity arises in their favor, which a court of equity is bound to protect, the more especially as the mortgagee, Ready, in his life-time, had actual notice that Hall claimed the premises by a perfect and unincumbered title more than three years before Hall sold to his co-defendants, Fredericks and Webert, and five years before suit brought.

There is nothing in the record to show these premises were improved, or in the actual possession of any one, at the time Hall purchased.

The sole question is, which of these parties should suffer — complainants, whose testator discharged his whole duty by placing his mortgage on record, or defendants, who purchased for value, without notice of any incumbrance, the record of the mortgage having been, long prior to their purchase, destroyed by fire?

It may be asserted as a correct general proposition where a person does an act which the law requires him to do, and in the manner prescribed, he has performed his whole duty and is entitled to the full benefit of its performance. The rights of Ready, the mortgagee, had become fixed by the record of his mortgage, which was notice for all time. Accident, no matter how disastrous, could not deprive him of these rights or affect them injuriously. What is the object of recording a deed of mortgage or any other deed? One object certainly is the security of the grantee, for thereby he is protected against a subsequent sale by his grantor, and we know of no principle of law or rule of equity which can deprive or should deprive him of this security. The mortgagee was prior in time, and we are not aware of any principle of law or equity which shall deprive him of the advantage of such priority.

It nowhere appears in this record, when Hall purchased of Page, the mortgagor, he made any inquiry of him as to the condition of the title. It was Hall's fault or folly that he did not make this demand of Page. The fact that the records were destroyed by fire, and an act of the general assembly passed to restore them, imposed no obligations upon Ready to incur the trouble and expense of the restoration of his mortgage. Unless it can be established that it was his duty to observe this law and, failing therein, he was guilty of a fraud upon the community, or committed gross negligence, which is its equivalent, he must be allowed to stand securely on his act of recording.

It is true that defendants' case has much equity in it, but it cannot be held to be superior to that of the complainants, and priority of time must determine the right. The accident of the fire destroying the record did not destroy the notice; it was not extinguished or lost by the destruction of the record book. In *Alvis et al. v. Morrison*, 63 Ill. 181; S. C., 14 Am. Rep. 117, a conclusion that the burning of records can have this effect, the court say, is preposterous.

The lapse of time since the execution of the note and mortgage (November 4, 1845) cannot affect the right of complainants, as the

Phelps v. Phelps.

note has been kept alive by the payment of the annual interest up to November, 1865, and has yet seven years to run before it is barred by the Statute of Limitations.

The fact that Ready in his life-time, in 1865, knew that Hall was in possession of the premises, claiming the same by a valid and unincumbered title, can in no degree weaken the claim of complainants. It is not shown Hall was induced to make the purchase by reason of any thing said or done by Ready, so as to estop his executors from asserting their rights. Unless it can be maintained, as we have before said, that the failure of Ready to restore the record of his mortgage, under the act of assembly, was a constructive fraud upon the community, no estoppel arises of which Hall or his co-defendants can avail.

Entertaining these views, the decree of the Circuit Court must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

PHILPS V. PHILPS.

(73 Ill. 545.)

Administration — Statutory allowance to widow — effect of ante-nuptial agreement upon.

A statute provided that upon the death of a married man certain specific articles should be allowed to his widow. *Held*, that such allowance was for the benefit of both widow and children, and that where there were children the allowance could not be affected by an ante-nuptial agreement.

PETITION by a widow to have awarded to her certain specific articles as by statute provided. The original report gives no facts other than those contained in the opinion.

Wilderman & Hamill, for plaintiff in error.

Marshall W. Weir, for defendant in error.

SCOTT, J. The decision in this case depends upon the construction that shall be given to the ante-nuptial agreement between the petitioner and her late husband, Michael Phelps, deceased.

Under our Statute of Wills, the widow in all cases is allowed certain specific articles of property for the benefit of herself and family, and the petitioner in this case would be entitled to the benefit of that provision unless her right is barred by the terms of that agreement. The clause which it is insisted bars the right is as follows: "It is agreed that the property of each shall be kept separate and distinct, held and enjoyed by each separately and distinctly in the same manner as if they were and had continued unmarried, and upon the death of either party his or her real estate and personal property shall pass to his or her heirs, executors and administrators, free from all claims of survivor."

The decedent had children by a former marriage. It was provided that the issue of their marriage, if any, should inherit the estate of the husband equally with his other children. One child was born unto them, which was living with the widow at the time of filing this petition.

No doubt ante-nuptial agreements are to be construed liberally for the purposes which they were intended to accomplish. The obvious meaning of the agreement in the case at bar is that it cuts off all the interest the widow would personally have by reason of her marriage in the property of her husband, both real and personal, but further than that it does not go. It was certainly never contemplated it would debar the wife of the right of support at the hands of her husband during his life-time, nor release him from his obligation to support their children, the fruits of their marriage, if there should be any. Neither party ever expected it to have such an effect. It was only intended to operate upon her interest in his property, but not to relinquish the means of support which it was his duty to furnish her and her family. That duty the law imposed upon him during life. Surely he was not released from his obligation in this regard by any thing contained in the ante-nuptial agreement.

The law also charges the husband's estate with the support of his widow and his children residing with her, for the period of one year after his death, at least to the extent of certain articles of property, or their value in money. This latter right is one created by positive law, and attaches in all cases, whether there is sufficient property or not to pay the debts of the decedent. Being a statutory right, it is one of which the husband cannot deprive his wife and children, no more than he can relieve himself of his obligation

Phelps v. Phelps.

to support them while living. It is in no case affected by the widow renouncing or failing to renounce the benefit of the provisions made for her in the will of her husband, or otherwise. Our laws on this subject have always been liberal, but the tendency of more recent legislation is to enlarge, rather than abridge, the beneficent provisions in this regard. The same protection has been extended by statutory enactments to the minor children of the decedent, where he is a householder at the time of his death, and leaves no widow.

The right of the wife to support during marriage is not an interest, strictly speaking, in the property of her husband. It is a benefit arising out of the marital relation by implication of law. Treating the provision which the law makes for the widow and the children residing with her, by the allowance of specific articles of property, as a means of support, it cannot be said to be an interest in the property itself of the husband. It comes within no definition of property. It is a benefit created in their favor by positive law, and adopted for reasons deemed wise and politic.

The ante-nuptial agreement in this case makes no allusion to these rights. Hence it cannot be said that the petitioner has released her right to the benefits of the obligations imposed upon her husband and his estate which are to inure to her and her family in case of his death. Its effect would be, to debar her dower in the estate of her husband, and prevent her from taking any portion as heir under the statute; but it is an unreasonable construction to say that it deprives her of the provisions the law has made in her behalf and for her husband's minor children residing with her. The specific allowance is as much for the advantage of the children of the decedent as for his widow. It is an absurd conclusion that any ante-nuptial agreement can deprive the children of the means of support, in their tender years, which the law has given. Should the construction contended for prevail, the debts of the decedent might exhaust the entire estate, and leave the family in utter destitution. As we said in *Strawn v. Strawn*, 53 Ill. 263, it was the design of the legislature to furnish the necessary sustenance for the household for one year after the death of the husband. We are at a loss to understand how this humane provision of law for the family of a deceased party can be affected by an ante-nuptial contract, however broad and comprehensive its terms.

The suggestion, the petitioner may have had separate property at

the time of her marriage, can make no difference in the decision of the case. She was not bound to use it for the support of his children, to the exclusion of the estate of her husband ; but if that question was material, we cannot know the amount of the property, nor that any portion of it was preserved until the death of her husband. So far as any thing appears in the record, the family may be entirely dependent on the estate. Independently of the question whether there is sufficient property to discharge the debts, the law has appropriated to the widow and the family residing with her such specific allowance as was deemed necessary for their support for one year, and made it a first charge upon the estate, to be first discharged to the extent there may be assets belonging to the deceased.

But there is another ground upon which the agreement may be held to be inoperative as to the widow's award. The statutory provision that exempts a portion of a man's estate from the payment of his debts, for the maintenance of his widow and minor children for a limited period, was adopted from motives of public concern. It is, that they may not become a charge upon the eleemosynary institutions of the State, as in many instances they would, but for this humane provision of the law. It is undeniable law that a party may waive the advantage of a statute intended for his sole benefit, but there are grave reasons why a law enacted from public considerations should not be abrogated by mere private agreement. The statute we are considering is of this character. It was intended to throw around the persons named that protection they are unable, in their helplessness, to procure for themselves. This is not a matter of mere private concern. It would be in contravention of the policy of this enactment to permit a party, by an ante-nuptial contract, to relieve his estate altogether from the maintenance of his widow and his children, when they could no longer sustain themselves. The statute has made a temporary provision for them, inadequate as it may be in many instances, and we think every principle of justice and humanity, as well as due regard for the general welfare, require us to hold that a party may not, by private agreement, contract against the liability imposed. It would place upon the State or local municipality the obligation the law has fixed upon his estate.

In *Kneettle v. Newcomb*, 22 N. Y. 249, it was ruled that a contract made by the head of the family, waiving the benefit of statu-

Phelps v. Phelps.

tory exemptions designed exclusively for the benefit of the family, was subversive of the policy of the enactment, and hence illegal and void. The decision, in part, is based upon the reasoning in *Woodward v. Murray*, 18 Johns. 400. See *Harper v. Leal*, 10 How. Pr. 276, upon the same point.

Motives of public interest cause the imposition of restraints or prohibitions as to the alienation of certain things, and even as to any dealings with them. The principle is, the citizen may not deal even with his own property in a manner detrimental to the general welfare or public safety. This is the doctrine of both the common and civil law. If the rule prevails as to articles of property, there is no just reason why it should not be maintained as to duties and obligations imposed by positive laws. The statute which sets apart certain specific articles of property, or their value in money, for the maintenance of the widow and family of the deceased, is in the nature of a charge upon the estate, dictated by the spirit of humanity and adopted in accordance with an enlightened public policy, and to permit a party to contract against its salutary provisions is simply to abrogate the law itself. This cannot be done.

Where there is no child or children of the decedent residing with the widow after his death, a very different question would be presented. The award would be for her sole use in such case, and might be treated as a personal right, which she could, if she chose, relinquish; but it is otherwise where there are children of the decedent constituting the family. The award is as much for their benefit as for hers, and she has no power to release it by an ante-nuptial agreement or otherwise. The policy of the law is, to provide a home for the family, that the domestic circle might remain unbroken during the period for which provision is made for them, notwithstanding the death of the husband. To effectuate that purpose, it is necessary that the widow should share in the benefit of the award.

For the reasons indicated, the judgment of the Circuit Court will be reversed, and the cause remanded with directions to affirm the judgment of the County Court granting the prayer of the petition.

Judgment reversed.

WALKER, C. J. I am unable to concur in the conclusion and the reasoning of the majority of the court in this case. It is apparent

to my mind that the *ante-nuptial* contract cut off all claims of the widow to any interest in the property of the husband, without regard to whether it be dower, award or other claim.

MORGAN V. EVANS.

(73 Ill. 533.)

Execution — issue of, after time limited by statute.

A statute provided that the execution on a judgment could issue "at any time within one year." *Held*, that an execution issued after the year was voidable but not void.

ACTION of ejectment. The opinion states the case.

James M. Warren, for appellants.

H. B. Kepley, for appellees.

MCALLISTER, J. This was ejectment, brought in the Effingham Circuit Court, by appellants against appellees, to recover possession of a certain tract of land situate in that county, of which appellees were in possession.

It appeared, that Joshua B. Whitney was the common source of title, and September 15, 1860, he conveyed the land in question, by warranty deed, to James M. Whitney. While the legal title was so in James M. Whitney, the appellants sued out of said Circuit Court an attachment against the estate of said James M. Whitney, who was a non-resident, which was levied upon the land in question, and constructive notice having been given pursuant to statute, appellants, at the April term, 1862, recovered a judgment for \$1,096.25, against said James M. Whitney, and special execution against the property attached was ordered. No execution, however, was issued until July 3, 1863, over a year from the time of the rendition of the judgment. On this execution, which was levied on the lands attached, the sheriff sold and appellants became the purchasers, receiving the sheriff's deed in December, 1864.

Some question has been made as to the sufficiency of the form of the judgment, but we have no doubt the proceedings in the attach-

Morgan v. Evans.

ment suit were regular down to the entry of the judgment, and that the latter is sufficiently formal to be valid.

The ground that the judgment lacked the requisite form being untenable, the only question remaining is, whether the circumstance that the special execution was not issued within one year after the rendition of the judgment, rendered it void, or only voidable. The court below excluded it from the evidence, and if it was not void but only voidable, this was error.

The statute is as follows : All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment has been or hereafter shall be obtained in any court of record, either at law or in equity, for any debt, damages, costs, or other sum of money, shall be liable to be sold upon execution to be issued upon such judgment, and the said judgment shall be a lien on such lands, tenements and real estate, from the last day of the term of the court in which the same may be rendered, for the period of seven years: *Provided*, that execution be issued at any time, within one year, on such judgment, and from and after the said seven years the same shall cease to be a lien on any real estate as against *bona fide* purchasers, or subsequent incumbrances by mortgage, judgment or otherwise."

This statute contains a plain recognition of the common-law rule requiring an execution to be issued within a year from the judgment, and if it had been intended that the consequences of non-compliance with that rule should be different from those which had been declared by the courts to follow such non-compliance at common law, such intention, it seems to us, would have been expressed in other language than that employed.

Patrick v. Johnson, 9 Levinz, 404, was trespass for false imprisonment. The defendant justified under an execution in his favor, against the plaintiff. The latter demanded *oyer* of the execution, which appeared to have been sued out above a year after the judgment, and then replied that no execution issued within the year; to which the defendant demurred, and it was resolved that the execution sued out after the year was not void, but only voidable by writ of error, but that until it was reversed it was a good justification.

In *Shirley v. Wright*, 1 Salk. 273, the sheriff had the defendant in custody on a *ca. sa.*, which issued after a year and a day without a *scire facias*, and let him escape ; and it was held the sheriff was liable, and should not take advantage of the error.

In *Parsons v. Loyd*, 3 Wils. 345, Lord Chief Justice DEGRAY marked the distinction between void and voidable process in this language : “ There is a great difference between erroneous process and irregular (that is to say void) process : the first stands valid and good until it be reversed, the latter is an absolute nullity from the beginning ; the party may justify under the first until it be reversed, but he cannot justify under the latter, because it was his own fault that it was irregular and void at first.”

The doctrine of these cases was fully recognized in *Reynolds v. Corp & Douglas*, 3 Caines, 271. KENT, C. J., there said : “ The case that most resembles the present is that of issuing execution upon a judgment which has lain dormant above a year and a day. At common law, the plaintiff in such case was driven to sue out a new original, but the statute of 13 Eliz., ch. 1, gave him a *sci. fa.* to revive the judgment. If, however, instead of bringing debt or *scire facias* upon the judgment, the plaintiff sues out a *ca. sa.*, the court, upon application, will set it aside, with costs. 2 Wils. 82 ; Barnes, 196, 206, 213. But it has been often adjudged, and it is well settled, that the party is not responsible in trespass for suing out the *ca. sa.*; for that the execution was voidable only, and was a good justification till reversed.”

In *Jackson v. Bartlett*, 8 Johns. 361, the question arose in respect to a *fi. fa.* and in an action of ejectment, as in the case at bar, only that a third person was the purchaser instead of the plaintiff in the execution. The court, however, laying no stress upon that circumstance, said : “ The question on the regularity of the *fi. fa.* could not be raised in this case. Though the execution may have issued a year and a day after judgment, without revival by *sci. fa.*, it was only voidable at the instance of the party against whom it issued. 3 Lev. 403 ; 3 Caines, 271, 273. It was good in point of form, and several reasons might possibly have been assigned, if the question had come up on motion to set it aside, why the execution was duly issued, even after the year and a day. It was not for the present defendant to question a purchaser's title under such an execution. It was good authority for the sale. *Shirley v. Wright, supra.*”

It may be proper to suggest, that if the judgment debtor should stay the execution, by injunction, upon a motion to set aside the execution issued after a year, that fact might be shown in answer to the motion. And it will be observed, that most of the cases above cited, expressly hold, that because it is voidable only, a *ca.*

Morgan v. Evans.

sa. sued out more than a year and a day after judgment is a justification to the plaintiff himself. This is upon the ground that, although erroneous and subject to be set aside at the instance of the defendant, yet it is not void, and constitutes a good authority in law to take the person. If good authority, as against the plaintiff who sues it out, for taking the person, it must be for taking the property of the defendant.

This principle, by analogy, is recognized by Lord Chancellor HARDWICKE, in *Jeanes v. Wilkins*, 1 Ves. Sen. 195, where he said: "To avoid the sale and title of the defendant, it must be proved that the *fi. fa.* was void and conveyed no authority to the sheriff, for it might be irregular, and yet, if sufficient to indemnify the sheriff so that he might justify in an action of trespass, he might convey a good title, notwithstanding the writ might afterward be set aside."

The principle here announced is, that where the writ is not void, but only voidable, and for that reason will afford a justification to the plaintiff in an action of trespass, the sheriff, by virtue of such writ, may convey a good title.

This whole doctrine was ably and elaborately discussed in *Woodcock v. Bennet*, in the Court of Errors of New York, 1 Cow. 711, and fully re-affirmed. It seems to us to be based upon principles having their foundation in necessity and convenience in the administration of justice.

The counsel for appellees has referred us to no case in this court directly holding to a contrary doctrine, nor are we aware of any so holding.

The case of *The People v. Peck*, 3 Scam. 118, has been supposed to hold that an execution issued more than a year and a day after judgment is void; but a close examination of that case will show that such is not the effect of that decision. It was a motion in this court for a *mandamus*, to compel the clerk to issue an execution after a year and a day, without *sci. fa.* The motion was denied on that and other grounds. The court did not say it was because the execution would be void, nor was it necessary that the court should so hold in order to sustain the decision; for if the execution would be voidable, the court would not compel the clerk to issue it -- that is, the court would not compel the clerk to issue a process which the defendant therein would have the right to immediately call upon the court from which it emanated, to set it aside.

Storey v. People.

It is the opinion of the majority of the court, that the special execution in question in the case at bar was voidable only, and not having been set aside, the sheriff had authority by it to convey good title to appellants. It follows that it was error to exclude it from evidence, and for that error the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

Scott, J., dissents.

STOREY V. PEOPLE.

(79 Ill. 45.)

Contempt — libel on grand jury — punishment of.

A libel on a grand jury in relation to an act already done, and not calculated directly to obstruct or embarrass the future performance of their duty, is not summarily punishable as a contempt of court.

PROCEEDING to punish the plaintiff in error, Storey, for contempt of court, in publishing certain articles in "The Chicago Times," reflecting upon the action of the grand jury in finding indictments against him in said court. The court below found defendant guilty and sentenced him to imprisonment. Defendant brought error.

Goudy & Chandler, for plaintiff in error.

Charles H. Reed, State's attorney, for the People.

SCHOLFIELD, J. The several articles copied into the information censure the action of the grand jury, and question its integrity, as a body, and one of them indirectly attacks the moral character of certain of the members of the grand jury. The information charges that these articles were published while the grand jury was in session, and, also, that respondent was charged with certain crimes and offenses, which were heard by the grand jury; but it is not alleged that the crimes and offenses so charged were pending before the grand jury for its action, at or subsequent to the time of the publication of the articles, or either of them. On the contrary, it is alleged that the articles were "of and concerning the

Storey v. People.

grand jury, and the individual members thereof," and of and concerning its action with reference to the complaint against the respondent, and "of and concerning its action with reference to other complaints presented to it"—all being in the past. And the respondent answers, to one of the interrogatories propounded to him, "that on the 13th day of March, 1875, and before any of said articles were so published, the grand jury * * * returned into said court three indictments against him for libel, and one for publishing an obscene newspaper, and said indictments were the only matters referred to in said articles, or any of them. And he further says, upon information and belief, that, at the time said articles were written and published, there were no complaints against him pending before said grand jury, of any kind whatever, and he did not suspect that any other or further indictments would be returned against him by said grand jury, and he denies that said articles, or any of them, or any part thereof, referred to any complaints or charges then pending against him before said grand jury."

There is no allegation that the publication of the articles is calculated to prevent the obtaining of a competent petit jury to try the respondent on the several indictments, or that the judge, whose duty it will be to preside during such trials, will, in anywise, be affected thereby in the discharge of his duty.

The only question, therefore, is, assuming the articles to be libelous, whether the publishing of a libel on a grand jury, or on any of the members thereof, because of an act already done, may be summarily punished as a contempt.

We do not understand the articles as having a tendency directly to impede, embarrass or obstruct the grand jury in the discharge of any of its duties remaining to be discharged after the publications were made. No allusion is made to any matter upon which the members were thereafter to act, and there could, therefore, of necessity, be no attempt to interfere with the exercise of their free and unbiased judgments as to such matters. No attempt is made to induce disobedience in officers or witnesses, and it does not appear that any direct interference with the administration of the law was in contemplation. All that it would seem could be claimed is, that the publications would cause disrespect to be entertained by the public for the grand jury, and for its action in the particular cases criticised, and thereby tend, to that extent, to bring odium

upon the administration of the law. That this is a grave offense, deserving of prompt and severe punishment, might be conceded, without, in the slightest degree, strengthening the position that it may be treated and punished as a contempt of court. The law, presumably, provides an adequate punishment and mode of procedure to protect society against all offenses, and neither the magnitude of a crime, nor the probability of its frequent repetition, has ever been held to authorize the courts to depart from the mode of trial prescribed by the law, or to impose a different punishment from that which it sanctions.

It is not denied by the counsel for the respondent, that courts may punish, as for contempt, those who do any act directly tending to impede, embarrass or obstruct the administration of the law ; but they deny that any publication, however disrespectful, when applied to jurymen in regard to the manner in which they have already discharged a duty, does or is calculated to impede, embarrass or obstruct the administration of the law.

Authority may be found in the text-books, and in English and American cases, holding a doctrine at variance with this position. Thus, for instance, Blackstone says, in showing how contempts of court may be committed, it may be "by speaking or writing contemptuously of the court or judges, acting in their judicial capacity ; by printing false accounts (or even true ones, without proper permission) of causes then depending in judgment ; and by any thing, in short, that demonstrates a gross want of that regard and respect which, when courts of justice are deprived of their authority (so necessary for the good order of the kingdom), is entirely lost among the people." But the law in relation to contempts has never been held, in any case decided by this court, to be so indefinitely broad as it is thus stated by Blackstone. Our Constitution and statutes certainly affect the question, to some extent, and it is only in determining precisely how far they do so, that we have any difficulty.

A statute of this State, in force for many years, provided that the Circuit and Supreme Courts should have power to punish contempts offered by any person to them while sitting, and for disobeying any of their process, rules and orders issued or made conformably to law. And the court held, in *Stuart v. The People*, 3 Scam. 395, that this statute might be regarded as a limitation upon the power of courts to punish for any other contempts ; and

Storey v. People.

newspaper articles, commenting upon the conduct of a juror who was also the editor of a rival political paper to that in which the articles were published, and reflecting contemptuously upon the judge, published during the pendency of a trial for murder, were held not to authorize an attachment for contempt.

It was said, in that case, in speaking of the power to punish as for contempt, in case of mere libels upon the court, having no direct tendency to interfere with the administration of the law: "It does not seem necessary, for the protection of courts in the exercise of their legitimate powers, that this one, so liable to abuse, should also be conceded to them. It may be so frequently exercised as to destroy that moral influence which is their best possession, until, finally, the administration of justice is brought into disrepute. Respect to courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence, and whilst they are found upon the judgment seat, so long, and no longer, will they retain the public confidence. If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country; and if he has received an injury, ample remuneration will be made."

In the more recent case of *The People v. Wilson*, 64 Ill. 195; S. C., 16 Am. Rep. 528, a majority of the court held that the publication of an article, indirectly charging that money had been used to procure a decision favorable to the defendant in a case pending before this court on a writ of error, was a contempt, and the court accordingly imposed fines upon the editor and publisher of the newspaper in which the offensive article was published. Authorities were referred to in support of the positions assumed by one or more of the members of the court in that case, and a train of reasoning pursued, in the separate opinions delivered, from which the court below may have inferred, and probably did infer, assuming the law had not since then been materially changed in this respect, that any libel upon the court or jury, whether tending directly to interfere with the administration of the law or not, might be punished as a contempt. But the decision turned upon the point, as will be seen by reference to the opinion of the chief justice, that the cause in preference to which the article was published was *then pending* before the court, undecided, and that the article was *calculated* to, and was *designed* to influence the members of the court in deciding it.

Had the law, therefore, as then in force, remained unchanged, it would be difficult to sustain the conviction of the respondent. But, since the decision of that case, the statutes have been revised, and the provision in regard to contempts, before quoted, has been repealed, leaving no statute in force on that subject, except in regard to the enforcement of decrees in Chancery, and the punishment of certain specific offenses, such as the failure of jurors to attend in obedience to summons, the failure of officers to make service and return of writs, etc.

Courts, however, possess certain common-law powers, subject to modifications that may have been imposed by our Constitution and statutes, among which is included that of punishing for contempts.

Differences of opinion have been entertained by members of this court at different times, in regard to the extent of such modifications; and we feel constrained, in giving expression to our views in the present case, to disagree, to some extent, with remarks made by some of the members composing the majority of the court in *Wilson's case, supra*.

In our opinion, it is not admissible, under our Constitution, that a publication, however libelous, not directly calculated to hinder, obstruct or delay courts in the exercise of their proper functions, shall be treated and punished, summarily, as a contempt of court.

Libels on courts of superior jurisdiction were, at common law, held to be contempts; but this did not apply to courts of inferior jurisdiction. If the power were necessary to the existence and usefulness of the court, obviously, the difference in the jurisdiction could make no material difference, since it is quite as important that justice shall be fearlessly and impartially administered in courts of inferior as in those of superior jurisdiction. But the power to punish for the constructive contempt in the court of superior jurisdiction originated in a fiction, and was for a purpose that has no analogy in our government.

In a recent case, *The Queen v. Lefroy*, L. R., 8 Q. B. 134 (4 Moak, 250), the respondent was arrested on an attachment for contempt, for writing a letter, which was published in a local newspaper, charging the judge of a County Court with falsehood. COCKBURN, C. J., in delivering the opinion of the court, among other things, said: "The power to commit for contempt is fully gone into by Blackstone and Hawkins; but though this power is recognized in the Superior Courts, it is nowhere said that an inferior court of

Storey v. People.

record has any power to proceed for contempt out of court—and this is an obvious distinction between the Superior and other courts of record. In the case of the Superior Courts at Westminster, which represent the one Superior Court of the land. this power was coeval with the original Constitution, and has always been exercised by them. These courts were originally carved out of the one Supreme Court, and are all divisions of the *aula regis*, where it is said the king, in person, dispensed justice, and their power of committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign. But it is a very different matter with respect to the County Courts, and similar inferior courts of record. No case can be found in which such a power has ever been exercised by an inferior court of record, or, at all events, upheld by the decision of the Superior Court.”

The theory of government requiring royalty to be invested with an imaginary perfection which forbids question or discussion is diametrically opposed to our theory of popular government, in which the utmost latitude and freedom in the discussion of business affecting the public and the conduct of those who fill positions of public trust, that is consistent with truth and decency, is not only allowable but essential to the public welfare.

The common-law mode of proceeding in cases of contempt presents no question of fact to be tried by a jury. The defendant determines, by his own answer, under oath, whether he is guilty of that which is charged against him as a contempt of court, and if he fail thereby to purge himself, the court may, at once, impose the punishment.

The law of libel, at common law, left the jury to determine whether the defendant was guilty of the publication alone; but the question of whether the publication was libelous was for the court; and it was not admissible to show, by evidence, that the publication was true, or the motives with which the publication was made. Whether, therefore, the party charged with the libel was tried by a jury or proceeded against summarily as for contempt, the only question of fact was whether he was guilty of the publication.

In this State, however, our Constitution guarantees “that every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel,

In re Tuller.

both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.”

This language, plain and explicit as it is, cannot be held to have no application to courts, or those by whom they are conducted. The judiciary is elective, and the jurors, although appointed, are in general, appointed by a board whose members are elected by popular vote. There is, therefore, the same responsibility, in theory, in the judicial department, that exists in the legislative and executive departments to the people, for the diligent and faithful discharge of all duties enjoined upon it; and the same necessity exists, for public information, with regard to the conduct and character of those intrusted to discharge those duties, in order that the elective franchise shall be intelligibly exercised, as obtains in regard to the other departments of the government.

When it is conceded that the guaranty of this clause of the Constitution extends to words spoken or published in regard to judicial conduct and character, it would seem necessarily to follow that the defendant has the right to make a defense which can only be properly tried by a jury, and which the judge of a court, especially if he is himself the subject of the publication, is unfitted to try.

Entertaining these views, the judgment of the court below must be reversed, and the respondent discharged.

Judgment reversed.

IN RE TULLER.

(79 Ill. 99.)

Will — of married woman — revocation by marriage.

A widow, having children, made her will, married again and died without issue by her second husband. *Held*, that her will was not revoked by implication of law on her second marriage, nor by a statute passed after her marriage, which enacted that marriage should revoke a prior will.

A PPEAL from an order refusing to admit a will to probate.

Cooper & Bassett, for appellant.

McCulloch, Stevens & Wilson and *Starr & Conger*, for appellee.

In re Tuller.

SHELDON, J. This is an appeal by Lydia A. Cole, residuary devisee and legatee under the will of Esther R. Tuller, deceased, from the order and judgment of the Circuit Court of Peoria county, refusing to admit said will to probate, such order and judgment having been made on appeal in reversal of an order of the County Court admitting the will to probate.

The facts are that Esther R. Tuller, on the 20th day of May, 1869, made and published her will, she being then a widow, and having at the time, living, three children by her former marriage, all of whom are still in full life.

Afterward, on the 2d of September, 1869, the testatrix was married to one Marcus Hosmer, from whom she was, on the 16th day of December, 1873, divorced by decree of the Circuit Court of Peoria county, upon bill filed by her for that purpose. The testatrix died on the 6th of March, 1874, having made no other will, and having had no child by said Hosmer.

The question presented for consideration is, whether there was a revocation of the will by the marriage with Hosmer.

It is the old and well-settled rule of the common law that the will of a *feme sole* is revoked by her subsequent marriage; and it is contended that, under this rule, the will was revoked. The reason of the rule was that a will is, in its nature, ambulatory during the testator's life, and can be revoked at his pleasure; that the marriage destroys the ambulatory nature of the will, and leaves it no longer subject to the wife's control; and that it is against the nature of a will to be absolute during the testator's life; it is, therefore, revoked in judgment of law by such marriage. 4 Kent's Com. 527; 2 Greenl. Ev., § 684.

That reason does not exist under our present statute of 1872, which gives to every female of the age of 18 years the power to devise her property by will or testament.

Did it exist under the Statute of Wills of 1845, in force up to 1872?

The first section of the Statute of Wills of 1845 provides as follows: "Every person aged 21 years, if a male, or 18 years, if a female, or upwards, and not married, being of sound mind and memory, shall have power to devise all the estate * * * which he or she hath, or at the time of his or her death shall have, in and to any lands, etc. All persons of the age of 17 years and of sound mind and memory, married women excepted, shall have

power to dispose of their personal estate by will or testament; and married women shall have power to dispose of their separate estate, both real and personal, by will or testament, in the same manner as other persons."

The statute draws a manifest distinction between the property generally of married women, and their separate property, giving power to dispose of the latter by will, but not of the former. The strict rules of the old common law, as is well known, would not permit the wife to take or enjoy any real or personal estate separate from or independent of her husband. But courts of equity have admitted the doctrine that a married woman is capable of taking real and personal estate to her own separate and exclusive use; and whenever real or personal property is given or devised or settled upon a married woman for her separate and exclusive use, her interest will be protected in equity against the marital rights and claims of her husband and of his creditors. The separate estate of a married woman was a creature of equity at the time of the passage of the statute of 1845.

By the statute of 1861, entitled "An act to protect married women in their separate property," all the property of a married woman is made her sole and separate property, and is thereby made as fully her separate estate as any separate estate which she could in any way have had at the date of the passage of the act of 1845, and after, except that the statute of 1861 gives no power of disposing of her estate. Such being the case, then, that under the statute of 1861, all of the property of a married woman is made her separate estate, we know no sufficient reason why, since the act of 1861, the statute of 1845 giving to married women the power to dispose of their separate estate by will, should not have operative effect in respect to all of a married woman's property, and be construed as enabling her to dispose of all her property by will in the same manner as other persons. The reason, then, for holding the will of a *feme sole* to be revoked by marriage would no longer exist, as the marriage would not destroy the ambulatory nature of the will, but still leave it subject to the wife's control.

The further reason given that the marriage of a *feme sole* is such an entire change in her condition and relations that it is generally held to work a revocation of her will (1 Redfield on Wills, 292) equally fails as, since the act of 1861, her marriage works no essential change in her conditions and relations as respects her

In re Tuller.

property. We are of opinion, then, that, since the act of 1861, the will of a *feme sole* is not revoked by marriage, the reason of the rule no longer existing. Her will, then, in this respect, must be regarded as standing upon the same footing with the will of a man. As respects his will, marriage is not a revocation of it, but marriage and the birth of a child are an implied revocation of a will previously made. Such was recognized by this court to be the rule in *Tyler v. Tyler*, 19 Ill. 151, and the authorities there referred to. But it was there held that, under our statute making the wife heir to the husband, and the husband heir to the wife, where there is no child or descendant of a child, marriage is, in the absence of facts showing an intention to die testate arising subsequent to the marriage, a revocation of a will of the husband, made prior to the marriage, disposing of his entire estate without making provision in contemplation of the relations arising out of the marriage.

It is insisted that the present case falls within that decision, and is controlled thereby.

The facts of that case were, that Stephen H. Tyler and the complainant in the suit intermarried in this State in 1842, and here lived as husband and wife until his death, in 1855; that he died, never having had a child, and leaving a considerable estate in this State; and that the defendants claimed his estate under a will executed in the State of Connecticut, where Tyler then lived, in 1834; which will devised his entire estate to his blood relatives. Under such circumstances, in view of our Statute of Descents, providing that, when there shall be a widow, and no child or descendant of a child of the intestate, then the one-half of the real estate, and the whole of the personal estate shall go to such widow, it was held that the marriage was a revocation of the will.

The reason of the rule of the English courts, that marriage and the birth of a child were, but that marriage alone was not, a revocation of a will, was recognized to be, that, by the law of descents there, the child may inherit the parents' estate, but that the wife and husband could not inherit from each other. But that, as under our law, the wife and husband may inherit from each other the one-half of each other's lands, in case there be no child or lineal descendant, the *reason* of the common-law rule would require that marriage alone would revoke a will, and the rule was made to conform to the reason of it, and it was held that marriage alone worked a revocation of the will. In that case there was no child

of the marriage, and from the instant of the marriage, upon the death of the husband without a will, one-half of his real estate, and all his personal estate, would have gone to the widow.

In the present case, the testatrix, at the time of the making of her will, and up to the time of her death, and since, had three children living. Had she died at any time during the existence of her marriage, all her property, in the absence of a will, would have gone to these children, and none of it to her husband. Where is the reason, then, to inquire, in such a case as this, that marriage alone should revoke the will?

Under the laws of this State, in force when the will was made, and since, Hosmer, the husband, could have taken nothing, if there had been no will. The property disposed of by the will was the separate estate of the testatrix. No estate by the curtesy ever became initiate. The marriage did not vest in the husband the personal property of the wife, nor any right to the rents and profits of the real estate, and as his wife had children of her own by her first husband, to inherit, he, Hosmer, could take nothing as her heir at her death.

The sole effect of the revocation would be, to let others inherit her property whom the testatrix had in her mind when she made her will, and purposed should not take her estate. To set aside the will would be to thwart the solemnly declared intention of the testatrix, and that, without benefit to the object of the marriage relation, on whose account, as a new object of duty to be provided for, the revocation of the will would be brought about.

The revocation of a will which arises from subsequent marriage and birth of a child is an implied or presumptive revocation. It is founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. 4 Kent's Com. 521.

Under the general rule, the circumstance of marriage alone did not lay the foundation of a presumed alteration of the testator's intention, but it was marriage and the birth of a child, and both must have concurred in order to raise an implied revocation of a will. *Brush v. Wilkins*, 4 Johns. Ch. 506.

There was a qualification of the general rule upon this subject, made in the case of *Sheath v. York*, 1 Vesey & Beames, 390, which bears strongly upon the present case. A widower, having a son

In re Tuller.

and two daughters, devised his estate real and personal, and then married and had a daughter. The Ecclesiastical Court held the will to be revoked as to the personal estate, but Sir Wm. GRANT thought there was no ground to presume the will revoked as to the real estate, upon any implied condition annexed to it, or upon any presumed change of intention, where the testator had already an heir apparent, and the revocation would be of no use to the subsequent child, who could not take the land. It might be revoked as to the personal estate, for that lets in the subsequent child; but he held that it was not, in such a case, revoked as to the land.

The principle of that decision seems to meet precisely the question now under consideration, and to require a qualification of the general rule laid down in *Tyler v. Tyler, supra*, that under our Statute of Descents, a subsequent marriage is a revocation of a will, and to exclude the application of the rule to the facts of the present case. for the reason that there is no ground to presume the will revoked upon any presumed change of intention, inasmuch as the testatrix had, at the time of the making of the will and ever after, three children, and, as was said in *Sheath v. York, supra*, the revocation would be of no use to the subsequent husband, as he could not take the property.

But it is said that it does not matter whether the husband or wife do actually become heir to the other or not; that it is enough that the marriage creates the possibility of such a result. But that is not the principle which governs. If it were, then, under the common-law rule upon the subject, marriage alone would work a revocation, as, upon a marriage, there would exist the possibility of the birth of a child; and in the case cited of *Sheath v. York* there was a possibility of the daughter of the subsequent marriage becoming an heir by the death of the son of the former marriage. It is supposed in the argument to be like the case of a child born after a subsequent marriage, where it does not matter whether it survives the parent or not; and it is said that there the birth of the issue, and the mere possibility of its becoming an heir by surviving its parent, at once revokes the will.

It is the occurrence of new social relations and moral duties arising by marriage and the birth of issue, raising a presumption of a change of intention in the testator, which impliedly revokes a previous will, and the revocation so made by the occurrence of those events is once for all, and the will is not restored on the

subsequent death of the issue contributing to produce the revocation, during the life of the testator.

But under the state of facts in this case there has been no actual occurrence of the circumstances to afford ground of a presumed intention to revoke the will, but only a possibility of such an occurrence taking place.

It is finally insisted, that there is here a statutory revocation of the will by force of the statute of 1872, Laws 1871-2, p. 355, in force July 1, 1872, that "a marriage shall be deemed a revocation of a prior will;" that, as the will did not take effect, nor were any rights acquired under it, until the testatrix's death, its validity depends upon the law as it then stood at the time of her death; that the statute, though passed after the making of the will, takes effect upon it precisely as though the law had been passed before its execution.

The question is not so much whether the statute affects rights *vested* before its passage, as, what was the intention of the legislature. A law is a rule of civil conduct, and the principle is, that it is a rule for the regulation of future conduct. It is, in general, true, that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of Parliament is that *nova constitutio futuris formam debet imponere, non præteritis*. 4 Bac. Abr. 636, Statute (C.)

It is the doctrine applicable to all laws, that, generally, they are to be considered as prospective, and not to prejudice or affect the past transactions of the citizen. Not that the legislature cannot, in some cases, make laws with a retrospective operation, but that it is not to be supposed they so intended, unless that intention has been manifested by the most clear and unequivocal expressions. *Garrett v. Wiggins*, 1 Scam. 335; *Bruce v. Schuyler*, 4 Gilm. 221; *Thompson v. Alexander*, 11 Ill. 54; *Marsh v. Chesnut*, 14 id. 223; *Hatcher v. Toledo, Wabash and Western Railroad Co.*, 62 id. 477; *Whitman v. Hapgood et al.*, 10 Mass. 447; *Somerset v. Dighton*, 12 id. 383; *Dash v. Van Kleeck*, 7 Johns. 477; Sedgwick on Stat. and Const. Law, 190-1 *et seq.*

This law of 1872 is not retrospective in terms; there is no indication of the legislative intention that it should be retroactive, and we must regard the intention to have been that it should have only a prospective, and not a retrospective, operation.

We are of opinion, then, that the enactment which went in force

Craft v. McConoughy.

July 1, 1872, that "a marriage shall be deemed a revocation of a prior will," was prospective in effect, and had reference only to marriages which should take place thereafter, and did not apply to marriages which had been had prior to the passage of the act, and that it is without effect upon this will of Mrs. Tuller.

Our conclusion is, that the court below erred in reversing the order of the County Court, instead of affirming the same, and that the judgment of the Circuit Court should be reversed and the cause remanded.

Judgment reversed.

CRAFT V. MCCONOUGHY.

(79 Ill. 343.)

Contract — against public policy — combinations to control trade.

The grain dealers of a town entered into a contract, which purported to be a contract of partnership for the purpose of dealing in grain, but the real object of which was to form a secret combination to control the grain trade, and to suppress competition. *Held*, that the contract was against public policy and void.

BILL in equity for an accounting. The opinion states the case.

M. D. Hathaway, William Barge and Sherwood Dixon, for plaintiffs in error.

James K. Edsall, for defendant in error.

CRAIG, J. This was a bill in equity, brought by James O. McConoughy against Richard C. Craft and others, for an account and distribution of the profits of an alleged partnership claimed to have existed under a written contract to the following effect:

"Articles of agreement made and entered into this 20th day of April, A. D. 1869, between the following persons, viz.: E. P. Sexton, Dr. John McConoughy, C. B. Boyce, R. C. Craft and William Wiswell, for the purpose of systematically pursuing the grain trade in Rochelle, and for mutual protection against losses. The said parties covenant and agree to enter into the grain trade for one

year from this date, upon the following terms: Our several grain houses shall be put into the business upon the basis of twenty-seven shares as the aggregate, divided as follows: C. B. Boyce and R. C. Craft shall be entitled to nine shares, E. P. Sexton to six shares, J. McConoughy to six shares, and William Wiswell to six shares. Each separate firm shall conduct their own houses as heretofore, as though there was no partnership in appearance, keep their own accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with; a list of all the grain purchased by each firm to be made every day and handed to the general book-keeper, with amounts paid for the same; also every car shipped to be reported at the time, and every account of sale to be handed in to said book-keeper, as well as all sales made at the warehouse from time to time. It shall be the duty of the book-keeper to make a faithful record of all the grain bought by each party, the amount of money paid for the same, and place to his debit, and also to credit him with all account of sales, as well as any transactions made at the warehouse, and, at the end of every month, each individual's account to be balanced, showing the profits or loss, which amount is to be divided *pro rata*, according to the number of shares held by each party. It is further agreed that there shall be no grain held for advance in price, or for any other cause, by any of the above-named parties.

"Prices and grades to be fixed from time to time, as convenient, and each one to abide by them. All grain taken in store shall be charged one and a half cents per bushel, monthly; but if sold inside of thirty days, no storage to be asked. No grain to be shipped by any party at less than two cents per bushel."

In November following the execution of the agreement, John McConoughy died, and it is the theory of the bill that the complainant, who was his son, by mutual consent came in and took his place under the contract.

It is set up in the answer, that the contract was made in restraint of trade, and is against public policy, and void; that all transactions with complainant or with his father and defendants, under or in pursuance of it, and under the alleged arrangement with complainant after the death of his father, were in restraint of trade, against public policy, and void.

Two questions arise upon the record: First, whether the contract set out in the bill is void. Second, if illegal and void, will a court

Craft v. McConoughy.

of equity, after it has been executed, require one of the parties to account to another for a portion of the gains arising under the contract ?

Prior to, and up to the time of the execution of the agreement set out in the bill, the four parties were engaged in the grain business in the town of Rochelle, each one on his own account, and in competition with each other, but, after the agreement was executed, all competition ceased. All the warehouses in the city, and every lot suitable to erect a warehouse upon, were controlled by the combination. Some were purchased and others leased, so that the combination formed effectually excluded all opposition in the purchase, sale, storage and shipment of grain in that market.

Secret meetings were held in the night-time by the parties to the contract, at which the price to be paid for grain was agreed upon, rates for storage and shipment fixed, in order that the public should be kept in ignorance of the plans and operations of this illegal combination.

To the public the four houses were held out as competing firms for business. Secretly they had conspired together, and were working in a common cause, in the sole interest of each other.

The language used in the contract itself leaves no room for doubt as to the purpose for which the agreement was entered into, as a few extracts will show : "Each separate firm shall conduct their own business as heretofore, as though there was no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with." *

* * "Prices and grades to be fixed from time to time, as convenient, and each one to abide by them. All grain taken in store shall be charged one and one-half cents per bushel, monthly." *

* * "No grain to be shipped by any party at less rates than two cents per bushel."

While the agreement, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain; yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was, to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country.

That the effect of this contract was to restrain the trade and commerce of the country is a proposition that cannot be successfully denied.

We understand it to be a well-settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable.

This subject was ably discussed in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181 ; see, also, 1 Smith's Lead. Cas. 172, and notes, and the rule of law established, which has been followed and adhered to in numerous cases since.

In reference to the point, what might be regarded a reasonable restriction, numerous cases might be cited, but what was said in *Horner v. Neves*, 7 Bing. 743, will illustrate the principle. TINDAL, C. J., said : " We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interest of the public, is void, on the ground of public policy."

If, therefore, the restraint imposed by the contract in question was but partial, as insisted upon by the complainant, as it was unreasonable, oppressive and injurious to the public, it cannot be sanctioned in a court of equity.

While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173 : S. C., 8 Am. Rep. 159.

Powers v. Briggs.

It is, however, insisted that, even if the contract was contrary to public policy, as it has been executed, a court of equity will require an account.

The rule is, however, well settled in this State, that a court of equity will not lend its aid in the division of the profits of an illegal transaction between associates. *Neustadt v. Hall*, 58 Ill. 172; *Skeels v. Phillips*, 54 id. 309; *Jerome v. Bigelow*, 66 id. 452.

The complainant and the defendants were equally involved in the unlawful combination. A court of equity will assist neither.

The decree will be reversed and the cause remanded.

Decree reversed.

POWERS V. BRIGGS.

(79 Ill. 408.)

Negotiable instrument — when agent liable as principal.

The trustees of a church gave a promissory note for a church debt, describing themselves in the body of the note as "trustees of" the church, and after their signatures appending the word "trustees." *Held*, that they were individually liable on the note. (*See note*, p. 179.)

ACTION on promissory notes. The opinion states the case.

Melville W. Fowler and John Morris, for appellant.

Ayer & Kales, for appellees.

SCHOLFIELD, J. Suit was brought on two promissory notes for \$600 each, one payable in one year and the other payable in two years from date, but in other respects precisely the same in form. That payable in one year from date is as follows:

"\$600.

CHICAGO, May 17, 1870.

"One year after date, we, the trustees of the Seventh Presbyterian Church, promise to pay to the order of H. G. Powers six hundred dollars, value received, with interest at six per cent per annum.

"A. H. BRIGGS,

"LOUIS B. KELLEY,

"JOHN CORBETT,

"F. D. MARSHALL,

"Trustees."

Evidence was admitted by the court below, over the plaintiff's objection, showing that, at the time the notes were executed, the defendants were trustees of the Seventh Presbyterian Church of Chicago, and that the notes were given for the difference in value between church organs which they had exchanged.

The court gave judgment for the defendants, and the correctness of that judgment depends upon the single question whether the notes bind the defendants individually or only the corporation of which they were trustees.

The authorities are not entirely harmonious on the question, but after a careful examination of the numerous cases cited in the elaborate briefs filed by the respective counsel, our opinion is the court erred in finding that the defendants were not individually liable on the notes.

The general rule appears to be where the names of the principal and agent both appear upon the instrument, it will be held to be the bill or note of him who signs it, unless it satisfactorily appears that he signed it in a mere ministerial character, intending to bind another. "Unless," said Lord ELLENBOROUGH, in *Leadbitter v. Farrow*, 5 M. & S. 345, "he says plainly, 'I am the mere scribe,' he will be bound."

The rule is thus stated by SHAW, C. J., in *Bradlee v. Boston Glass Co.*, 16 Pick. 350: "As the forms of words in which contracts may be made and executed are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or the trust in which he acts, or the person for whose account the promise is to be made; or whether the words referring to the principal are intended to indicate that he does a ministerial act in giving authenticity to the act, promise and contract of another. Does the person signing apply the executive hand as the instrument of another or the promising and engaging mind of a contracting party?" See, also, *Morrell v. Coddington*, 4 Allen, 403; *Leach v. Blow*, 8 Sm. & M. 221; *Chick v. Trevett*, 20 Me. 462; *Fogg v. Virgin*, 19 id. 352; *Sturdivant v. Hull*, 59 id. 172; *Barker v. M. F. Ins. Co.*, 3 Wend. 94; *Hills v. Bannister*, 8 Cow. 31; *Moss v. Livingston*, 4 Com. 208; *Dewitt et al. v. Walton*, 5 Seld. 571; *Savage v. Rix et al.*, 9 N. H. 263; *Tucker Manufacturing Co. v. Fairbanks et al.*, 98 Mass. 101.

Testing these notes by this rule, it would seem clear they are

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Burlingame v. Brewster.

binding only on the defendants as individuals. Although the words, "the trustees of the Seventh Presbyterian Church," appear in the body of the notes, and the word "trustees" is appended to the defendants' signatures, there are no words used implying an undertaking on the part of the corporation. The corporation is not assumed to be acting by or through the defendants, nor does it even appear the defendants act for or on behalf of the corporation. The language clearly indicates that the defendants were trustees when they signed the notes, but not that the corporation promised to pay them.

Nor do we consider the facts proved here, outside of what appears on the face of the papers, change the result. True, they show plaintiff knew the defendants were trustees, and that the consideration of the notes was the church organ, but it does not follow from this that the plaintiff was giving credit to the corporation, or that he knew the defendants intended, by the notes, that he should do so, and there is no other evidence tending to show that he gave credit to the corporation. It was not unreasonable that the defendants, having the charge and control of the finances of the corporation and being acquainted with its resources, would give their paper for property for the corporation, intending to protect themselves against loss from its funds, and the notes themselves are the most satisfactory evidence that they did do so.

In this view of the case it is unnecessary to express any opinion as to the admissibility of the parol evidence.

The judgment is reversed and the cause remanded.

Judgment reversed.

SCOTT, C. J., and SHELDON, J., dissent.

BURLINGAME, appellant, v. BREWSTER.

(79 Ill. 515.)

Negotiable instrument — alteration of — when agents liable as principals.

A note, purporting by its terms to be the personal promise of the makers, was signed by A, B, & C, "as trustees of the First Universalist Society;" a blank being left above these words for the signature of D, a fourth trustee; and the note was delivered to the payee to obtain that signature, which he did

Burlingame v. Brewster.

after tearing off, without D's knowledge, the descriptive words. *Held*, that the makers would have been personally liable on the note, even had the descriptive words not been torn off; and that, therefore, the note had not been materially altered when D signed it, and that he was liable on it. (*See note, p. 179.*)

ACTION on a promissory note. The opinion states the case.

J. W. Brown, and C. H. Brush, for appellant.

Bushnell, Bull & Gilman, for appellee.

SCHOLFIELD, J. Suit was brought against the appellant, Burlingame, alone, on a promissory note, of which the following is a copy:

“EARLVILLE, Ill., Jan. 1, 1871.

“One year after date I promise to pay Joseph Brewster, or order, the sum of four hundred and sixty 70-100 dollars, at the office of the Exchange Bank, Earlville, Ill., with ten per cent interest from date, until paid.

(Signed)

“C. C. WARREN,
“THOMAS PENDIEU,
“CHAS. M. SMITH,
“A. C. BURLINGAME.”

Defense was interposed by pleas filed for that purpose, setting up, in substance, that the consideration of the note was building material purchased by the signers of the note as trustees of the First Universalist Society of Earlville; that after the note was signed by Warren, Pendieu and Smith, they appended, below their signatures, leaving a blank for appellant's signature, the words, “as trustees of First Universalist Society,” and in this condition placed the note in the hands of appellee, to obtain appellant's signature; that appellee fraudulently, etc., and without informing appellant thereof, tore from the note the words “as trustees of the First Universalist Society,” before presenting the same to appellant for his signature. Demurrer was sustained to the pleas, and the question is, whether the defense should have been allowed.

There being no pretense that the note has been altered or changed since appellant's signature was affixed to it, the only inquiry is, did the tearing of the words “as trustees of First Universalist Society of Earlville” from the note, materially change or alter it, so as to discharge the previous signers from liability on it? If it did, it is

Barlingame v. Brewster.

evident that appellant's liability is affected, for he signed upon the assumption of the co-liability of these parties ; if it did not, he is unaffected by the alteration, and the defense was properly disallowed.

The body of the note shows a personal undertaking. Its language is, "I promise to pay," etc., which is inconsistent with the idea of corporate liability ; and while the words torn from the note, following the signatures, would show that it was as trustees they were induced to make the note, they do not show any attempt, by words usually deemed apt for that purpose, to bind the corporation. Such notes have been repeatedly held to be the mere personal undertaking of the signers. *Hills v. Bannister*, 8 Cow. 31 ; *Eaton v. Bell*, 5 Barn. & Ald. 34 ; *Sturdivant v. Hull*, 59 Me. 172 ; *Barow v. Congregational Society in Lee*, 8 Allen, 460 ; *Andrews v. Estes*, 11 Me. 267 ; *Slawson v. Loring*, 5 Allen, 340 ; *Draper v. Massachusetts Steam Heating Co.*, id. 338.

Our conclusion is, that the alleged alteration of the note in nowise affected the liability of any of the signers to it, and that there was no error in the ruling of the court below.

The judgment is affirmed.

Judgment affirmed.

SCOTT, C. J., and SHELDON, J., dissenting.

NOTE.—See *Means v. Stormstedt* (32 Ind. 87), 2 Am. Rep. 330, and note, 332, wherein are collected many authorities ; *Carpenter v. Farnsworth* (106 Mass. 561), 8 Am. Rep. 380 ; *Vater v. Lewis* (36 Ind. 238), 10 Am. Rep. 29 ; *Halle v. Petroe* (33 Md. 327), 3 Am. Rep. 139 ; *Sturdivant v. Hull* (59 Me. 172), 8 Am. Rep. 409 ; *Houghton v. First Nat. Bank* (26 Wis. 663), 7 Am. Rep. 107 ; *Northwestern Distillery Co. v. Brant* (69 Ill. 658), 18 Am. Rep. 631.

See, also, a very careful and thorough collation and examination of the authorities on this question made by Mr. F. B. Murray, librarian of the Buffalo Law Library, 16 Alb. Law Jour. 409 ; 16 id. 117 and 345. Consult Wharton on Agency, 290 ; Story on Agency, §§ 155, 275 ; 1 Parsons' N. & B. 90, et seq. ; Story on Notes, § 68 ; Edwards on Bills and Notes, 83 ; Daniels on Negotiable Instruments, § 293, et seq. ; Byles on Bills, 60 (6th ed.).

That the mere addition of the word "agent," or of the official style or designation of one signing a negotiable instrument, does not relieve him from personal liability, seems to be in accordance with the general current of American authorities. *Pents v. Stanton*, 10 Wend. 271 ; *Savage v. Ritz*, 9 N. H. 263 ; *Thurston v. Mauro*, 1 Greene, 231 ; *Morell v. Coddington*, 4 Allen, 403 ; *Chadsey v. McCreery*, 27 Ill. 253 ; *Drake v. Flewellen*, 33 Ala. 106 ; *Fowler v. Atkinson*, 6 Minn. 578 ; *Rand v. Hale*, 3 W. Va. 495 ; *Downman v. Jones*, 4 Q. B. 235 ; *Dutton v. Marsh*, L. R., 6 Q. B. 361, *Collins v. Ins. Co.*, 17 Ohio St. 215. But it has been held otherwise where it is shown that the party signing has been in the constant habit of signing notes in this way which have been regularly paid by the principal. *Hovey v. Magill*, 2 Conn. 680.

Guardian Mutual Life Insurance Company v. Hogan.

Mr. Parsons says (1 Bills and Notes, 97): "If an agent of an incorporated company make a note beginning 'I promise,' etc., and sign it 'A B, agent of — Company,' we should say that the company, not the agent, will be liable on the note." Citing *Dispatch Line v. Bellamy Manuf. Co.*, 12 N. H. 205; *McCall v. Clayton*, Busbee, 422; *Proctor v. Webber*, 1 D. Chlp. 371; *Roberts v. Button*, 14 Vt. 195; *Shelton v. Darling*, 2 Conn. 425; *Johnson v. Smith*, 21 id. 627. See, however, otherwise, *Moss v. Livingston*, 4 N. Y. 208.

In *Dutton v. Marsh*, L. R., 6 Q. B. 361, four directors of a joint-stock company signed their names to a promissory note: "We, the directors of the Isle of Man Slate Company, limited, do promise to pay," etc., and the corporate seal was affixed. The directors were held to be personally liable as makers of the note. COCKBURN, C. J., in delivering judgment, said: "Let us assume for the present that the seal was not affixed. The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But, on the other hand, if they state they are signing the note or acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus v. Melrose*, 3 H. & N. 177; 27 L. J. (Ex.) 826, fully establishes, they do not make themselves liable, when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented.

"If, therefore, in this case it had simply stood that the defendants, described as directors, but without saying 'on behalf of the company,' signed the promissory note, it is clear they would have been personally liable, and could not be considered as binding the company. But this case was rendered doubtful by the fact of the corporate seal being affixed to the document. It does not purport in form to be a promissory note made on behalf of or on account of the company. So far as the written portion of it goes it is totally without any such qualifying expression, but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms on the face of the note, that the note was signed by the persons who put their names to it on behalf of the company, and not on behalf of themselves. But on consideration I agree with my learned brothers that that effect cannot be given to the placing of the seal of the company upon the note." — RAR.

GUARDIAN MUTUAL LIFE INSURANCE COMPANY V. HOGAN.

(30 Ill. 35.)

Life insurance — insurable interest of son in life of father — excessive insurance.

The relation of father and son does not give the son an insurable interest in the life of the father, unless the son has a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father.

Guardian Mutual Life Insurance Company v. Hogan.

Though a person may have *some* insurable interest in the life of another as creditor or otherwise, yet if he cause that life to be insured for a sum largely in excess of any loss that he can possibly suffer by the death of such person, the presumption is that the policy is a wager policy, and invalid.

ACTION on a policy of insurance for \$10,000 issued by the defendants, the Guardian Mutual Life Insurance Company, upon the life of John Hogan, and payable to his son, Patrick Hogan, the plaintiff.

The evidence tended to show that Patrick Hogan procured the policy on his father's life, without the father's knowledge or consent, and paid the premiums thereon; that defendant's agents, who took the application and through whom the policy was issued, were cognizant of this fact and of all the circumstances surrounding the transaction. The son was about 40 years of age; the father about 60. The son lived at a distance from the father, and was not dependent upon him.

The plaintiff recovered judgment for the full amount, and the defendant appealed.

Sleeper & Whiton, for plaintiff in error.

William Lathrop, for defendant in error.

SHELDON, J. [After deciding other questions.] Objection is also taken to this instruction, which was given for the plaintiff:

“ If the jury believe, from the evidence, that the plaintiff, Patrick Hogan, was the son of John Hogan, and that the relations between father and son were amicable and affectionate, and that John Hogan was a prosperous and well-to-do man; and if the jury further believe, from the evidence, that Patrick Hogan had remained at home and worked for his father several years after he became of age, for which he had received no compensation from his father; and if they also believed, from the evidence, that Patrick Hogan had made valuable improvements after he became of age upon an eighty acres of land of his father, under a promise or well-grounded expectation that his father would give him the land upon which the improvements had been made, and that his father, John Hogan, had subsequently disposed of the land, and had made said Patrick Hogan no compensation for the improvements made by him, said Patrick Hogan. thereon, and that he, Patrick Hogan, had a just, legal and moral claim upon his father for such labor and

Guardian Mutual Life Insurance Company v. Hogan.

improvements upon said piece of land, at the time of making said application for insurance upon the life of his father and the issuing the policy thereon, then the court instructs the jury that such facts would constitute an insurable interest in Patrick Hogan in the life of his father, John Hogan."

As also to the refusal to give the following instructions, which were asked on behalf of the defendant:

"If you shall find, from the evidence, that the applications for insurance bearing date December 29, 1868, and October 28, 1872, offered in evidence and purporting to have been made by John Hogan, were really in substance the application of Patrick Hogan for insurance on the life of his father, then you will inquire whether Patrick had an insurable interest in the life of his father which would support a policy for \$10,000.

"In determining this question, you will inquire whether, from the evidence, it appears that at the time of making such applications, said Patrick had any pecuniary interest, as creditor or otherwise, in the life of his father, or any reasonable expectation of profit or advantage which might be thwarted by his father's death, for the law will not enforce policies of insurance procured for mere gambling or wager purposes upon lives, on the continuance of which the assured cannot be deemed to have an insurable interest; and the mere relation of father and son, where both parties are of mature years and live apart, in independent pecuniary circumstances, and mutually entirely independent of each other, and having no business relations with each other, does not create an insurable interest in the son on the life of the father; and in deciding whether, in this case, Patrick Hogan had such an interest in his father's life as will support the insurance procured, you will take into account all the evidence as to the respective ages and situations in life of the father and son, and their business and social relations and all other facts which tend to show whether, as above defined, the son had any insurable interest in his father's life at the date of his application aforesaid.

"You are further instructed that, though a party may have *some* insurable interest in the life of another as creditor or otherwise, yet, if the amount of insurance procured upon such life appears palpably to be very largely in excess of any possible loss the assured can suffer from the death of the insured, then the presumption of a gambling or wager insurance arises, which calls upon the assured

Guardian Mutual Life Insurance Company v. Hogan.

to show that such insurance was not procured as a mere cover for gambling or a wager upon the life of the insured; and in this case if you believe, from the evidence, that the plaintiff had some interest of an insurable character, as already defined, in his father's life at the date of his several applications for insurance, yet if you find, from the evidence, that the amount procured was vastly disproportionate in its excess to any probable loss which Patrick might suffer from his father's death, such circumstance has a tendency to prove that the insurance was procured for mere purposes of speculation and as a cover for gambling, and if, from the evidence, you shall find that such was the fact, then the plaintiff cannot recover in this action."

Under the facts, we consider that Patrick Hogan had no just or legal claim upon his father for labor or improvements, and that should not have been submitted to the jury as a question for them to find upon. A moral claim would not constitute an insurable interest in behalf of one as a creditor. The facts, as we regard them, were no more than evidence tending to show an insurable interest, and should not have been declared by the court to constitute an insurable interest.

As said by the court in the case of *Ruse v. The Mutual Benefit Life Insurance Company*, 23 N. Y. 516, "A policy obtained by a party who has no interest in the subject of insurance is a mere wager policy."

"But policies without interest, upon lives, are more pernicious and dangerous than any other class of wager policies, because temptations to tamper with life are more mischievous than incitements to mere pecuniary fraud." And see 3 Kent's Com. (11th ed.) 462-3.

It is said that every man has an interest in his own life to any amount he chooses to value it, and may insure it accordingly. But what is such an interest in the life of another as will support a contract of insurance upon the life, is confessedly not as yet well defined under the authorities. Some of them tend in the direction that the mere relationship, as between father and son, reciprocally, is a sufficient foundation upon which to rest an insurable interest.

Mr. May, in his late treatise on the Law of Insurance, § 107, says that precise question yet remains to be decided, and he states, as the result of his review of the authorities, his conclusion to be, that the relationship seems to be of little importance except as

Guardian Mutual Life Insurance Company v. Hogan.

tending to give rise to the circumstances which justify a well-founded expectation of pecuniary advantage from the continuance of the life insured, or risk of loss from its termination.

Mr. Bliss, in his work on Life Insurance, § 31, seems to arrive at essentially the same conclusion. We are disposed, from an examination of the authorities, and our own sense of the requirement of sound public policy, to concur in such conclusion, and hold that the mere relation here of father and son did not constitute an insurable interest in the son in the life of the father, unless the son had a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father.

We do not regard as really holding any thing different, the case, cited as a contrary authority by appellee's counsel, of *Insurance Company v. Bailey*, 13 Wall. 619, where the court, in discussing this question, say, as the better opinion, "that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured."

We think this may consist with the idea that it is the well-founded expectation of advantage to be derived from the continuance of the life insured which makes the insurable interest in it, and not the mere relationship as between father and son, under any and all circumstances.

The circumstances of the situation of the parties, as bearing in this connection, were, that, at the time of the application for the original policy, John Hogan was an infirm man, having but a partial use of his right arm and leg, unable to labor, engaged in no business, and sixty years of age, as the application states, though his age was a point in dispute, there being evidence tending to show he was at least five years older. He had four children; had been married to a second wife about four years before, by whom he had a young child. He left an estate of some \$13,000, and a legacy by his will of \$1,000 to Patrick Hogan. The latter was forty years of age, living away, in another county, some seventeen miles distant, with a family of children, upon a farm of his own, of 300 or 400 acres.

As respects the second refused instruction, appellee's counsel.

Union National Bank v. Oceana County Bank.

saying nothing in justification of its refusal, asserts that it was given, and files with his brief a certificate of the clerk of the Circuit Court to that effect. But we, of course, cannot notice it. The bill of exceptions states that the instruction was refused. We can only look to and act upon that.

Cammack v. Lewis, 15 Wall. 643, was a case where, in a policy of insurance to a creditor on the life of a debtor, the sum insured was so largely disproportionate to the amount of the creditor's claim, that the policy was held void, as being a mere wager policy. The principle of the decision would seem to have entitled the defendant to the instruction.

According to the views which have been expressed, the first refused instruction was substantially correct, and, we think, should have been given, as well as the second one, as also that the above ones given for the plaintiff should have been refused.

Other questions have been raised and discussed, which, in order to the disposition of the case, it is unnecessary to notice, and we pass them by, without considering them.

The judgment is reversed and the cause remanded.

Judgment reversed.

UNION NATIONAL BANK V. OCEANA COUNTY BANK.

(80 Ill. 312.)

Bank check — effect of.

Where a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and a transfer of the check carries with it the title to the amount named in the check to each successive holder. (*See note, p. 186.*)

ACTION upon a bank check. The opinion states the case.

Fuller & Smith, for appellant.

J. C. & J. J. Knickerbocker, for appellee.

SCOTT, C. J. This action is upon a check drawn by James H. Ledlie, on the Union National Bank of Chicago, in favor of Underhill and Gray, and by them indorsed and delivered to the Oceana

Union National Bank v. Oceana County Bank.

County Bank, located at Pentwater, in Michigan. The declaration contains a special count upon the check, and also the common money counts. On the trial, plaintiff recovered a judgment for the amount of the check, with interest, and defendant brings the cause to this court on appeal.

The evidence shows there was no unreasonable delay in presenting the check to defendant for payment, and, notwithstanding it is shown the bank had funds in its possession on deposit subject to check, at the time, belonging to the drawer, in excess of the amount of the check, payment was refused, for the reason the drawer had previously ordered the bank not to pay it.

The facts proven in this case bring it clearly within the rule declared in *Munn et al. v. Burch et al.*, 25 Ill. 35. The doctrine of that case has been so frequently affirmed in other cases in this court, it is not necessary now to discuss it as a new question. The principle of all the cases in this court on this subject is that, when a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and that a transfer of the check carries with it the title to the amount named in the check to each successive holder. After the check has passed to the hands of a *bona fide* holder, it is not in the power of the drawer to countermand the order of payment. The case at bar is controlled by this principle, and we content ourselves by simply making reference to our former decisions, where it is declared. *The Chicago Marine and Fire Insurance Co. v. Stanford*, 28 Ill. 168; *Bickford v. First National Bank*, 42 id. 238; *Brown v. Leckie et al.*, 43 id. 497.

Adhering, as we do, to the doctrine of the cases cited, we are of opinion the evidence offered to prove facts establishing a defense as between the drawer and the drawees of the check was properly rejected.

The judgment must be affirmed.

Judgment affirmed.

NOTE.—This case is not in accordance with the law outside of Illinois and Kentucky. The unbroken current of authorities is that the payee of a check before it is accepted by the drawee cannot maintain an action upon it against the latter, as there is no privity of contract between them. *Aetna Nat. Bank v. Fourth Nat. Bank* (46 N. Y. 82), 7 Am. Rep. 314; *Carr v. Nat. Security Bank* (107 Mass. 45), 9 Am. Rep. 6, and note; *Exchange Bank v. Rice* (107 Mass. 37), 3 Am. Rep. 1; *Cass v. Henderson* (23 La. Ann. 49), 8 Am. Rep. 590; *First Nat. Bank v. Whitman*, 94 U. S. 343; *Bank v. Millard*, 10 Wall. 152.—REP.

Northwestern University v. The People ex rel. Miller.

NORTHWESTERN UNIVERSITY V. THE PEOPLE EX REL. MILLER.

(80 ILL. 333.)

Taxation — exemption from — constitutional limitations.

The Constitution of a State provided that "such property as the general assembly may deem necessary for schools, religious and charitable purposes may be exempt from taxation." *Held*, that only such property could be exempted as was actually used for the purposes named in the Constitution; and that there could be no exemption of lands held for profit merely, although such profit was devoted to educational, religious or charitable purposes.

ACTION to recover delinquent taxes. The opinion states the case.

Sidney Smith and Goodrich & Patterson, for appellant.

James P. Root and George O. Ide, for appellee.

SCHOLFIELD, J. This appeal is from a judgment rendered by the Cook County Court against certain lands and town lots in the towns of Evanston and Willmette, in Cook county, for delinquent taxes.

Appellant's claim is, that the lands and town lots are exempt from all taxation, which claim is based on the fourth section of an amendment to its charter, approved Feb. 14, 1855, in these words: "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes."

It is conceded by a stipulation read in evidence on the trial in the court below, and made part of the record, that the lands and town lots, the taxation on which is in controversy, "are leased by appellant to different parties on leases for a longer or a shorter time, and that none of them are used or occupied for buildings or other direct appliances for education."

The question we propose to consider is, conceding that the clause we have quoted from appellant's charter is, as it seems to be, broad enough to comprehend these lands and town lots, was it competent for the general assembly, under the Constitution of 1848, which was in force at the date of that enactment, to grant an exemption so broad and sweeping in its character?

Northwestern University v. The People ex rel. Miller.

It was provided by section 3, article 9, of that instrument: "The property of the State and counties, both real and personal, and such other property as the general assembly may deem necessary for schools, religious and charitable purposes, may be exempted from taxation."

It is not claimed that appellant is, in any sense, a public corporation, but it is claimed that the purpose for which it is created is so far beneficial to the public, that it affords a sufficient consideration for the grant of exemption from taxation in the amendment, and that when the amendment was accepted and acted upon by the corporators it must be held a vested right, which cannot be withdrawn by subsequent legislation, because of the provision in the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of a contract.

If it was competent for the general assembly to make the exemption, we are not disposed to contest the correctness of this position; but if it was not competent to make the exemption, the attempt was a nullity, and the case is not affected by the Constitution of the United States.

The corporation being private, the tax payer, in general, is relieved of no obligation in consequence of the exemption which he would otherwise have to discharge by the payment of taxes, and in proportion as appellant becomes the owner of property which is thereby withdrawn from taxation, the burden of taxation is increased upon him.

The equality between burden and benefit, in such cases, is presumptive only, and can, if at all, only be true in fact in reference to the public as an aggregate. In the very nature of things, such exemptions must, proportionally, increase the burdens upon individual tax payers, in many cases, where there can be no corresponding actual benefits. It is true, it is impracticable that there can, in any instance of the levy and collection of public taxes, be an actual equivalent received by every tax payer for the full amount he pays, or that there can be any system of taxation devised so perfect in its practical operation, that there shall be no inequality in the distribution of the burden; but it has always been recognized that laws imposing taxes are just and equitable in proportion as they approximate such principles, and unjust and inequitable as they depart from them. The general principle upon which taxation was required to be levied by the Constitution of 1848, was that

Northwestern University v. The People ex rel. Miller.

of uniformity, and exemptions were exceptional, and, therefore, to be construed strictly ; and such is the general rule of construction in regard to exemptions from taxation. Cooley on Taxation, 146 ; Sedgwick on Stat. and Const. Law, 632. As is said in a recent case by the Supreme Court of the United States, *Tucker v. Ferguson*, 22 Wall. 527 : “ The taxing power is vital to the functions of government. It helps to support the social compact, and give it efficacy. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden—but the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all.”

Bearing in mind this rule of construction, if it had been intended the general assembly was to be empowered to exempt all property, of whatever kind or description, as is assumed to be done by the amendment to the charter, we must suppose it would have been so said, in unmistakable language. By the language of the Constitution we have quoted, while a discretion is conferred on the general assembly, whether to exempt or not, and if it shall determine to exempt, the amount of the exemption, it is clearly restricted, in the exercise of this discretion, to property for schools, and for religious and charitable purposes. Property for such purposes, in the primary and ordinary acceptation of the term, is property which is itself adapted to and intended to be used as an instrumentality in aid of such purposes. It is the direct or immediate use, and not the remote or consequential benefit to be derived through the means of the property, that is contemplated. Houses, furniture, grounds, etc., to be actually used for educational purposes, may be said to be for schools, or for school purposes ; but property to be used in farming or manufacturing, or in trades, is property for farming, for manufacturing or for trade, and the purpose to which the resulting profits may be devoted does not change its character. So, property owned by corporations created for school, religious or charitable purposes, and property for schools, or religious or charitable purposes, by no means necessarily mean the same thing. The ownership may extend to all kinds of property author-

Northwestern University v. The People ex rel. Miller.

ized by the charter, whether it is such as is to be actually used in connection with the purposes of the incorporation or otherwise ; but property for the purposes of the incorporation must be such as is to be used in connection with those purposes. An accurate description of the property, the tax upon which is in controversy, would seem to be, "property used for profit for the benefit of the university."

As illustrative, and in support of this construction, the following cases, which, though arising on the construction of statutes, are equally pertinent to the construction of like clauses in constitutions, may be referred to :

In *The First M. E. Church v. The City of Chicago*, 26 Ill. 482, the question was, whether, under a statute exempting from taxation "every building erected for the use of any literary, religious, benevolent, charitable or scientific institution," a building was exempted of which the third and fourth stories were in one large room used exclusively for religious purposes, while the first and second stories were rented for compensation, and the proceeds applied to religious purposes ; and it was held, the portion rented for compensation was taxable, and the portion occupied for religious purposes was not. The court said : "The meaning of the law is, as applied to religious buildings and furniture, that they must be used directly for sacred, and not for secular purposes. It is not enough that the profits or income of the secular uses are to be applied to sacred purposes. When money is made by the use of the building, that is profit, no matter to what purpose that money is applied. It will be observed that the words of the statute, there, in describing the building to be exempted, are, 'any building for the use of any literary or religious society,' etc. ; and the argument that the fact the profits derived from renting were devoted exclusively to religious purposes, showed that the rooms rented, as well as the balance, were for the use of the religious society, was equally as forcible, and rested on the same premises, as does the argument here that the property is for schools, or the purposes of schools, although it is devoted to agricultural, or other purposes entirely disconnected from schools, because the profits to be derived from renting it are to be appropriated in aid of the university."

In *Pierce v. The Inhabitants of Cambridge*, 2 Cush. 611, the statute exempted from taxation "the personal property of all literary, benevolent, charitable and scientific institutions, and such

Northwestern University v. The People ex rel. Miller.

real estate belonging to such institutions as shall be actually occupied by them, or by the officers of such institutions, *for the purposes for which they* were incorporated."

The plaintiff was a professor of mathematics and astronomy in Harvard College, and the house and land which he occupied was the property of the college, but had been let to him at a rent of \$400 a year, and the question was, whether this property was within the exemption of the statute. It was held that it was not—that the occupation of a lessee was not such an occupation as was intended by the statute, but that it would have been otherwise if the building had been erected by one of the professors or officers of the college, and had been occupied by the plaintiff with the permission of the college, and without having any estate therein or paying any rent therefor.

Washburn College v. Commissioners of Shawnee County, 8 Kans. 344, presented the question, whether a quarter section of land held by the plaintiff, which was a literary and educational institution, for the sole purpose of thereafter erecting its permanent buildings thereon, but which was at that time unimproved and unoccupied, was exempt from taxation, under a clause in a statute exempting from taxation "all property used exclusively for State, county, municipal, literary, educational, scientific, religious and charitable purposes;" and it was held that it was not. See, also, *Orr v. Baker*, 4 Ind. 86; *Methodist Church v. Ellis*, 38 id. 3; *Lowell v. Lowell*, 1 Metc. 538; *State v. Ross*, 4 Zab. 497; *Wyman v. St. Louis*, 17 Mo. 335.

Our conclusion is, that it was not competent for the general assembly to exempt from taxation property owned by educational, religious or charitable corporations, which was not itself used directly in aid of the purposes for which the corporations were created, but which was held for profit merely, although the profits were to be devoted to the proper purposes of the corporation. To the extent, therefore, that the 4th section of the amendment to appellant's charter, approved February 14, 1855, assumes to do so, it is to be considered void and of no effect, but no further.

The judgment is affirmed.

Judgment affirmed.

WILKINSON V. DEMING.

(80 Ill. 343.)

Guardian — right of mother to appoint by will after divorce.

A decree of divorce was granted for the fault of the husband, and the custody of the child was given to the mother. *Held*, that the father had no further control of the child; and that a guardian appointed by the will of the mother was entitled to the guardianship of the child as against the father.

PETITION filed by the appellant Andrew Wilkinson against the appellee, to obtain the custody of appellant's infant daughter, Sarah A., then about seven years of age. It appears that in January, 1871, the mother of the child obtained a decree of divorce against the appellant for cruel treatment, which gave her the custody of the daughter. On Dec. 2, 1873, the mother died, having, by her last will, appointed the appellee testamentary guardian of the child. The County Court afterward granted letters of guardianship to appellee, without notice to appellant. The petition sought to have these letters revoked. The court refused to take jurisdiction and to grant the prayer.

Henry & Johnson, for appellant.

F. D. Ramsay, for appellee.

BRESE, J. Several questions of importance, and new in this court, arise upon this record.

The first is, what is the effect of a decree of divorce *a vinculo*, for the fault of the husband, wherein the custody of the child is committed to the wife. And, second, on the death of the wife, the child surviving, has she the power to appoint, by will, a guardian for the infant, the father of the infant living.

We are inclined to hold, the decree, on a divorce being granted for the fault of the husband, giving the custody absolutely to the mother, takes away, *ipso facto*, all control of the father over the child. It nullifies, or at least neutralizes, the rule of the common law, and takes from the father all power thereafter over the infant, until it shall be restored by the action of a proper court. By the decree, the infant is no longer the child of the divorced father, but is entirely under the control of the mother, until, in this case, the infant being a female, she shall arrive at the age of eighteen years.

Wilkinson v. Deming.

If this be so, then as the father, in case there had been no separation, could have appointed a guardian by his last will and testament, so could the mother, she having, by a decree of a court of competent jurisdiction, been vested with the absolute control of the infant.

Section 17, of chap. 47, title "Guardian and Ward," R. S. 1845, p. 268, gives power to the father to make such a testamentary disposition of his child. The mother, when of sound mind and memory, being sole, may dispose, in like manner, of the custody and tuition of a child living, if the father has made no such disposition, or in any other manner restrained the right of the mother.

The act of 1874 makes somewhat different provisions on this subject, but are not disposed to govern this case, as the decree of divorce, and giving the custody of the child to the mother, passed in 1871, and under the act of 1845.

There is no testimony tending to show the guardian and appellee in this case is not a fit person to take charge of this child, and to rear her. They seem to be devoted to each other, and the child, on examination by the judge, expressed a preference to remain with her, being her maternal aunt, and exhibiting great unwillingness to be committed to the care of appellant, whom she did not know.

A point is made, that the court admitted improper testimony, being *ex parte* affidavits, on behalf of appellee. We do not see any objection in the record to admitting these affidavits — they seem to have gone in by consent. Nor was there any error in refusing to appellant the right to read his answer in the divorce case, for the reason that paper, as an answer, had been withdrawn from the files by appellant, and a decree taken against him for want of an answer. There was no answer to be read — it had no existence.

It may be well to say, in the event of the death of the present guardian, a Court of Chancery would have power to entertain, on another application, the suit of the father for the custody of the child, if she has not reached mature age.

We see no error in the record, and the decree must be affirmed.

Decree affirmed.

ISETT V. STUART.

(80 Ill. 404.)

Bankruptcy — jurisdiction of State court.

On a petition to the District Court of the United States by partners to have the partnership adjudged bankrupt, personal service was made without the district on a partner refusing to join in the petition. *Held*, insufficient and that a State court would hold an adjudication of bankruptcy on such service void as to such partner.

BILL in Chancery to set aside a mortgage. The opinion states the case.

J. Scott Richman and Osborn & Curtis, for appellant.

Charles A. Peabody and Connelly & McNeal, for appellee.

SCHOLFIELD, J. John M. Stuart, assignee in bankruptcy of Thomas M. Isett, exhibited his bill in Chancery against Thomas M. Isett and Edward B. Isett, to set aside a mortgage, from the former to the latter, alleged to have been made in fraud of the Bankrupt Act.

Notice was given to the defendants in the bill by publication, and decree rendered by default in favor of the complainant; but appellant was subsequently, on his petition, permitted to appear and defend, whereupon he filed an answer, putting in issue the material allegations of the bill, denying that the mortgage was made in fraud of the Bankrupt Act; that Thomas M. Isett was ever legally adjudged a bankrupt, or that the court assuming to so adjudge had any jurisdiction for that purpose, and alleging that the mortgage was made in good faith, without notice of any proceedings in bankruptcy, for a full, valuable consideration. Evidence was heard, and the court, thereupon, reaffirmed its former decree, with the modification that the mortgage be held void only as against the complainant's rights in the land.

It is objected that the court below had no jurisdiction of the subject-matter of litigation; that the remedy of the complainant was in the Federal courts exclusively, because State courts have no jurisdiction to aid in the enforcement of the bankrupt laws of the United States. We have been unable to find any decision of the

Issett v. Stuart.

Supreme Court of the United States on the question, and there are decisions by State courts of the highest respectability both ways. *Voorhies v. Frisbie*, 25 Mich. 476 ; S. C., 12 Am. Rep. 291 ; and *Brigham v. Clafflin*, 31 Wis. 607 ; S. C., 11 Am. Rep. 623, sustain the objection, while *Cook v. Whipple*, 55 N. Y. 150 ; S. C., 14 Am. Rep. 202 ; *Stevens v. The Mechanics' Savings Bank*, 101 Mass. 109 ; S. C., 3 Am. Rep. 325 ; *Ward v. Jenkins*, 10 Metc. 583 ; *Hastings v. Fowler*, 2 Carter (Ind.), 216 ; *Boone v. Hall*, 7 Bush, 66 ; S. C., 3 Am. Rep. 288 ; *Mays v. Manufacturers' National Bank*, 64 Penn. St. 74 ; S. C., 3 Am. Rep. 573, and *Cogdell v. Exum*, 69 N. C. 464 ; S. C., 12 Am. Rep. 657, hold it untenable, and, we think, they announce the correct rule.

Circuit Courts, in this State, have general jurisdiction of all cases at law and in equity, and this without regard to the origin of the right or a source of title. Titles derived from the general government, and contracts made in other States or in foreign governments, are the frequent subject of litigation, without question of jurisdiction of the courts.

No question is made of the right of Congress to enact a general bankrupt law, or that, when enacted, it is obligatory upon all the citizens of all the States and all the Territories in the Union. Being thus obligatory, no State court can nullify it or refuse to enforce it in a proper case. It makes the execution of a deed or a mortgage, although in good faith, after the filing of the petition in bankruptcy, fraudulent and void as to creditors.

If a deed or mortgage be made without a sufficient valuable consideration, and creditors are thereby defrauded, it is conceded a court of equity has jurisdiction, at the suit of an assignee in bankruptcy, to set it aside. The only difference between such a case and the present is in the elements which render the conveyance fraudulent in law. If, therefore, it be true that the jurisdiction of the court is not limited by the origin of the right or the source of the title, it is impossible that it can make any difference whether the law, by virtue of which the instrument is declared void, is the common or statute law of the State, or the statute of the United States. In either case it is the supreme law of the land, fixing the rights of the parties in regard to the property in litigation.

In cases affecting the rights of individuals under the laws relating to the sales of the public lands, the laws relating to patents and copyrights, and in many other cases, in determining the ownership

of property or rights under contracts, it is indispensable that the State court shall ascertain and determine what the rights of the parties are, as defined by the acts of Congress under which they originate. It has never been supposed this was an usurped jurisdiction, but it has always been conceded that in such cases the State courts act upon subject-matters within their jurisdiction, and adjudicate rights as determined by laws which, although not enacted by the State legislature, are, nevertheless, supreme, and, therefore, as obligatory in respect to persons and property affected by them within the State, as are laws enacted by the State legislature in relation to matters where its authority is supreme with reference to persons and property affected by them.

This is not an attempt to administer the bankrupt law through a State court, but simply to ascertain and declare the rights of parties with reference to property, after an adjudication in bankruptcy in the proper court and in consequence of that adjudication.

We cannot yield our assent to the position, although it has been assumed by courts for which we entertain profound respect, that the question involved is, whether we shall enforce the penal laws of the United States. Wherein does the enforcement of rights, as determined by the bankrupt law, differ, in principle, from the enforcement of rights as affected by the statutes for the prevention of frauds and perjuries? We are unable to discover any distinction. Under both, certain contracts that would otherwise be held valid cannot be enforced, and the rule of evidence is so changed as to make certain things evidence of fraud which were not so deemed by the common law. No penalty is, in either case, imposed for doing or not doing — but in both, the doing of the thing is simply prohibited, and no right can be enforced in violation of the prohibition.

The petition under which the adjudication in bankruptcy was had, was addressed to the Hon. Samuel Blatchford, judge of the District Court of the United States for the Southern District of New York, by which court the judgment was rendered. The petition was filed by partners of Thomas M. Isett, praying that the members of the firm be declared bankrupt. Isett refused to join in the petition, and the only notice he had of the proceeding was by personal service made on him in Jersey City, in the State of New Jersey, beyond the jurisdiction of the Circuit Court of the United States for the Southern District of New York.

Isett v. Stuart.

Was this service sufficient to give the court jurisdiction to adjudicate as against Isett ?

Section 36 of the Bankrupt Act provides that a partnership may be declared bankrupt upon the petition of one or more of its members. Section 10 of the same act authorizes the justices of the Supreme Court of the United States to frame general orders for regulating the practice and procedure in bankruptcy. Under this authority they framed order No. 18, which is as follows: "In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the copartnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against." Section 40 of the Bankrupt Act provides how notice shall be given a debtor petitioned against, as follows: "A copy of the petition and of such order shall be served on such debtor by delivering the same to him personally, or leaving the same at his last usual place of abode, or if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication, in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service of such publication."

In *Stuart, Assignee, v. Hines*, 33 Iowa, 60, the Supreme Court of Iowa held this particular service good on the ground that personal service might be made anywhere. The court thought it impossible it could be said Isett was not found, because the return showed he was found, and, therefore, if such service was not good, no service could have been made on him.

We are unable to yield our assent to this conclusion. This statute, as we think, should receive a like construction as is given to statutes having similar provisions in relation to attachment and chancery proceedings in State courts. We are not aware that it was ever held in any case, under such a statute, that it is necessary to pursue the party wherever he may be heard of, to lay a basis for a return or an affidavit that he cannot be found. The process of the court has vitality and may be enforced wherever its jurisdiction extends, but beyond this it has no validity. The words "not found," in such cases, are to be understood with reference to the

place where there is authority to make service, and it is not to be presumed that search is to be made elsewhere. We are clearly of opinion there was no authority to make service of the writ beyond the jurisdiction of the court issuing it, and that the return "not found" could have been lawfully made when it was ascertained Isett was beyond the limits of the Southern District of New York. The same view has been expressed by the Circuit Court of the United States for the Fifth Circuit, in the case of *Ala. and Chat. R. R. Co. v. Jones*, 5 B. R. 97; Bump on Bankruptcy (6th ed.), 623.

But it is contended the law did not require that any service of notice should be made on the non-consenting partner, and the order of the justices of the Supreme Court does not repeal the law.

The proceeding was adverse to the non-consenting partner, and upon principle he was entitled to notice. We regard the order itself as a judicial construction by the highest tribunal having authority to adjudicate upon the question, that the non-consenting partner is by the spirit of the act in the same situation as the debtor petitioned against, and, therefore, entitled to the same notice.

However, by section 14 of the Bankrupt Act, it is provided that "a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him, as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for and recover the property of the bankrupt," etc. And it is insisted that this section prohibits all inquiry into the jurisdiction of the court.

This is not tenable. If there was no jurisdiction there could be no judgment, and hence no assignment. All orders to that effect would be nullities. The question of jurisdiction was proper to be inquired into, and would have been so even had the record on its face have shown that the court had jurisdiction, according to recent rulings of the Supreme Court of the United States. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light and Coke Co.*, 19 id. 58.

Our conclusion is, the court had no jurisdiction to adjudge Isett a bankrupt, and that all proceedings thereunder were, therefore, void.

That the service was made in Jersey City is shown by the face of the record, and any presumption that might possibly arise that the court had other and sufficient evidence of lawful service before it is excluded by positive proof that no other service was made.

The decree of the court below is reversed.

Decree reversed.

Melvin v. Lamar Insurance Company.

MELVIN V. LAMAR INSURANCE COMPANY.

(30 Ill. 445.)

Corporations—conditional subscriptions to stock.

Certificates of stock in a corporation were issued and paid for under a contract in writing agreeing to subscribe therefor, and reserving to the subscriber the right to withdraw the money paid and to have the subscription canceled. *Held*, that the contract was void as to subsequent subscribers.

BILL in equity by Melvin and others, on behalf of themselves and other stockholders in the Lamar Insurance Company, alleging that the officers of said company and the defendants, Cushman & Hardin, were guilty of collusion and fraudulent conduct prejudicial to the rights and interests of other stockholders in this, that Cushman & Hardin having, in September, 1869, subscribed for and taken a large amount of the shares of said company, to wit: 5,500 shares, and paid for the same in the usual way, were afterward permitted to and did surrender all of said shares, and withdraw from the company all the money and assets (\$110,000) which had been paid by them therefor; that they were at the time officers of the company, Cushman being the treasurer, and Hardin vice-president; and that their acts were in bad faith toward the other stockholders; that judgments were recovered against the insurance company, and executions being returned unsatisfied, a receiver of the company was appointed under a creditor's bill filed against the company and others; that the terms of payment for stock, as provided by the by-laws of the company, were five per cent cash, and fifteen per cent in three equal installments, in three, six and nine months from date of subscription; the remaining eighty per cent being included in what is called a stock note, subject to payment upon calls made by the board of directors; that the receiver, under order of the court, had made a call of twenty per cent upon the stockholders, but that he ignored Cushman & Hardin as stockholders for the 5,500 shares, which had been issued to them, and their liability to refund the moneys withdrawn by them from the company; that there is a large amount of the first installment of twenty per cent unpaid upon stock subscriptions; that others of the defendants have moneys belonging to the company, and that all these sums, including the moneys withdrawn by Cushman &

Melvin v. Lamar Insurance Company.

Hardin, ought to be collected and applied to the payment of the debts, before resort is had to an assessment upon the stock.

The prayer of the bill was that Cushman & Hardin be required to refund the money withdrawn by them, and that they be compelled to take the position of stockholders in respect to the 5,500 shares of stock which they surrendered, etc.

Cushman & Hardin's answer claims that the money by them withdrawn from the company was in payment of a loan ; that they only held the 5,500 shares as security, upon which they advanced the \$110,000 ; and they make an exhibit to their answer a copy of the contract, under which they received the 5,500 shares, and paid the \$110,000 in money and securities to the company. They also claim that the stockholders, at a meeting in May, 1871, ratified and confirmed the action of the officers and directors of the company, including the surrender of stock and withdrawal of moneys, and that a committee of the stockholders, at that meeting, fully released and discharged them from all liability in respect to the transactions complained of in the bill.

Exhibit A, before mentioned, of the answer of Cushman & Hardin, commences by reciting that the Lamar Insurance Co. began business, relying upon sale of its stock for a supply of capital to insure payment of its losses, and has, up to date, sold about \$550,000 ; that its liabilities are about \$6,000, and its assets from stock subscriptions, now being paid and falling due within nine months, are about \$80,000 ; that the auditor requires of the company the ownership of \$100,000 in acceptable securities, and that, although his demand is unlawful and could be successfully resisted, yet litigation would ruin the credit of the company, and they have concluded to sell stock to enable them to comply with the auditor's requirements ; that Cushman & Hardin, bankers of Chicago, have been induced to advance means to enable the company to comply with the law. The contract then proceeds : " Now, therefore, this contract, made this 16th day of September, A. D. 1869, between the Lamar Insurance Company, by Leonard Swett, its president, party of the first part, and Messrs. Cushman & Hardin, party of the second part, *witnesseth*, that the party of the second part does hereby agree to subscribe for and purchase 5,500 shares of the capital stock of said company, and to pay therefor, to said party of the first part, the sum of \$550,000, as follows, to wit. \$35,000 in cash, and \$75,000 in such first mortgages or other secur-

Melyin v. Lamar Insurance Company.

ines indorsed by the said Cushman & Hardin, as shall be acceptable to the auditor of the State of Illinois, and such as shall be accepted by said auditor as a proper security to be held by said company to insure the payment of its policies, and in compliance with the general insurance law of the State of Illinois, and the remaining eighty per cent of said stock, not paid as aforesaid, shall be subject to a call of the stockholders of said company, under its charter and by-laws.

“ And whereas, in the ordinary course of the sales of its capital, said company exacts a payment of five per cent, and receives the bond of the stockholders without security for the remaining fifteen per cent, in three, six and nine months, it is hereby agreed between the parties hereto, that in consideration of the aforesaid subscription, and the prompt payment of the twenty per cent as aforesaid said company will pay said Cushman & Hardin the sum of \$11,000, which payment shall be in twenty per cent paid stock, at one and one-half per cent discount, being considered the cost of selling the same, and eighty per cent upon the same being subject to the call of the stockholders aforesaid. That is, in payment of said \$11,000 said company agrees to issue to said Cushman & Hardin 591 shares of said stock, with twenty per cent paid, and \$25 in cash.

“ And whereas the said subscription may be larger than said Cushman & Hardin may desire to hold permanently, and whereas the said company have the authority, under their charter, to issue and sell five millions of its capital stock, and are now selling the same at the rate of 2,000 shares a month, it is hereby agreed by and between the parties hereto, that at the expiration of one year from this date, at the election and request of said Cushman & Hardin, the said Company shall resell, and place in the hands of other purchasers, such portion of the stock hereby subscribed for and purchased, as the parties of the second part shall desire, and without any expense to said Cushman & Hardin, and the said company hereby guarantees that the said resale shall equal in its net proceeds the amount of money and securities paid by said Cushman & Hardin, under this contract, and in the event of such resale said company shall repay to said party of the second part the full amount of money paid by them under this contract, and shall return to them the securities also paid under this contract, which shall be accepted by said Cushman & Hardin in full payment of all liabilities of said company to them. Or, if said party of the second

Melvin v. Lamar Insurance Company.

part shall prefer, said company, upon demand at the expiration of one year from the date hereof, shall repurchase any portion of said stock which Cushman & Hardin shall demand, and shall pay them for the same the amount paid by said Cushman & Hardin, without interest, and shall refund to them the securities received by said company, in payment for the subscription aforesaid, which sum of money repaid and which securities returned, as aforesaid, shall be in full discharge of all liabilities under this contract.

“If the said parties of the second part shall desire to have resold, or to have the company repurchase any portion of said stock, less than the full amount subscribed for and purchased as aforesaid, the said company hereby agrees to resell or repurchase the amount named by said parties of the second part, in which event the company shall repay a *pro rata* amount of the money or securities paid under this contract.

“It is also agreed that all moneys of said company, as soon as received, shall be deposited with said Cushman & Hardin, as bankers, from which deposits the company shall check out whatever amounts are necessary to the successful prosecution of its business, and the surplus, whenever the amount shall reach \$30,000, the company shall, if desirous of doing so, check out, and invest all but \$10,000 in such securities as the party of the first part shall deem for the best interests of the company. Such securities, when purchased, shall be deposited with the treasurer of the company.

“If at the expiration of one year from the date hereof said Cushman & Hardin shall not request the resale and repurchase of said stock, or some portion thereof, then said company shall be discharged from all liability under the contract.

“And whereas said company hopes to be able, if Cushman & Hardin desire it, to repurchase any or all of said stock before the expiration of the year from this date, it is therefore agreed that if Cushman & Hardin shall desire to close the transaction before one year, the company will, at any time hereafter, take up any of said stock, when they can, in small quantities, provided they can do so consistently with their obligation to their policy-holders, and with due regard to the proper management of said company.

“In the event of a resale or a repurchase by the company of all or any portion of the stock subscribed for, under this contract, the company agree, in repaying the securities, to account for any interest which they may have collected upon the same. The sub-

Melvin v. Lamar Insurance Company.

scription and purchase named in this contract shall be made within ten days from this date.

“Dated at CHICAGO, *September* 17, 1869.

(Signed) LEONARD SWETT, *Pres't.*
CUSHMAN & HARDIN.”

The memoranda indorsed upon said contract are to the following effect :

“1. Under date of September 17, 1869, it is agreed, as part of the contract, that all interest upon the securities paid shall accrue to the benefit of Cushman & Hardin for one year, and if, at the end of the year, they elect to keep the stock, the company shall pay to them all the interest it has received on said securities, taking the securities at their face in payment for the stock.

“2. Under date of May 6, 1870, is indorsed a cancellation of \$100,000 of the stock, and a repayment of the percentage paid thereon; also a modification of the contract so as to give the company the option within the year to cancel the stock upon the terms and conditions named in the contract.

“3. Under date of October 26, 1870, is indorsed a cancellation of \$125,000 of the stock, and a return of the percentage paid thereon; also an extension of the contract for six months, in consideration of which the company agrees to pay Cushman & Hardin \$3,459, payable monthly.

“4. Under date of April 10, 1871, is indorsed a cancellation of the remainder of the stock, and the repayment to Cushman & Hardin of \$65,000, being the amount paid by them thereon.

“5. Without any date is the following indorsement: ‘It is hereby agreed, as a part of this contract, that the \$11,000 paid in stock shall be in lieu of dividends upon the principal, for one year from the date of this contract.’”

Upon the hearing, the court below dismissed the bill, and the record is brought into this court for the purpose of asking, especially, a reversal of the decree as respects Cushman & Hardin.

John N. Jewett and Sidney Smith, for plaintiffs in error.

Monroe, Bisbee & Ball, for defendants in error.

SHELDON, J. We have no doubt that, under the written contract of September 17, 1869, which was introduced in evidence with all its indorsements, Cushman & Hardin were actual stockholders in

Melvin v. Lamar Insurance Company.

the Lamar Insurance Company, in respect to the 5,500 shares of stock which were the subject-matter of the contract, and that they did not take the shares merely as collateral security for a loan of \$110,000, in money and securities, as insisted upon in the defense, although the latter was the real transaction between the parties as intended by themselves.

The first clause of the contract, after the recitals, is an absolute agreement, on the part of Cushman & Hardin, "to subscribe for and purchase five thousand five hundred (5,500) shares of the capital stock of said company, and to pay therefor to said party of the first part (the Lamar Insurance Company), the sum of five hundred and fifty thousand dollars (\$550,000), as follows:" The concluding words of the contract are, that "the subscription and purchase named in the contract shall be made within ten days from this date." Certificates for those 5,500 shares of stock were actually issued to Cushman & Hardin, and they paid the twenty per cent, in accordance with the contract. Thereupon, Cushman & Hardin became the absolute owners of the 5,500 shares, under the contract. Whether they should be resold or repurchased by the company was entirely at the option of Cushman & Hardin, and in no manner detracted from the completeness of their title. The option was a right, secured by the contract, above and in addition to the absolute title.

Could Cushman & Hardin relieve themselves from their responsibilities as stockholders, by the surrender and cancellation of the certificates of stock and the repayment by the company of their advances thereon, without consent of the other stockholders?

The Lamar Insurance Company was incorporated in 1865, but the first stock was subscribed in 1869. Its assets being insufficient to authorize it to do business under the General Insurance Law of 1869, the auditor demanded that the company should have \$100,000 in acceptable securities and assets, and, although the company disputed the right of the auditor to make this demand, and claimed exemption from the operation of the law of 1869, in order to avoid litigation, as alleged, the company concluded to comply with the demand. It appears, too, from testimony in the case, that there was difficulty in selling stock in the country, without the auditor's certificate. It seems the only means the company had for raising the further assets demanded by the auditor was by sale of its capital stock. Resort was had to Cushman & Hardin, and the arrangement of September 17, 1869, was entered into.

Melvin v. Lamar Insurance Company.

The stock taken by Cushman & Hardin, under that arrangement, enabled the company to comply with the auditor's demand, and procure his certificate and authority to do business. Mr. Brinkerhoff, superintendent of the insurance department, in the office of the auditor, says that, whilst he was examining into the condition of the company, at that time, the president of the company, and Hardin both assured him that the assets shown to him were the *bona fide* assets of the company, and that stock was issued to Cushman & Hardin in payment for the securities. The certificates of stock were exhibited to him. The auditor's certificate bears date October 4, 1869, and was made part of a circular shortly thereafter issued by the company, in which it is stated that the subscribed capital is \$1,021,000, and the paid-up capital \$141,800. Mr. Brinkerhoff's certificate is also included, showing the assets of the company to be \$210,518.58, which must have included the money and assets furnished by Cushman & Hardin. A letter of the president of the company to Phillips, who was the agent of the company at Danville, under date of December 29, 1869, and which was certified to by Cushman & Hardin as correct, and which would appear to be a circular letter to be sent to the agents of the company, was in evidence, and in that the sales of stock are set down at \$633,000 for the month of September, 1869, which, of course, must have included the 5,500 shares to Cushman & Hardin. Several persons, among them Vandewater, one of the complainants, who subscribed for stock subsequent to September 17, 1869, testify that Cushman & Hardin were represented to be large stockholders, at the time they subscribed for their stock.

Thomas, one who so subscribed, says that Cushman himself stated to him that he had something like \$500,000 of the stock, although Cushman denies this in his testimony.

There were subscriptions made to the stock of the company, after September 17, 1869, to an amount exceeding \$1,200,000.

This, then, is the condition of Cushman & Hardin in respect to these 5,500 shares. Certificates of stock were issued to them in the usual form, and it so appeared upon the books of the company. The exhibition and representation of the certificates as *bona fide* certificates and of the assets as *bona fide* assets, enabled the company to obtain the auditor's certificate.

Cushman & Hardin held themselves out, and allowed others to represent them, as stockholders for that amount, or, that their stock

Melvin v. Lamar Insurance Company.

was a part of the subscribed stock of the company. Thereafterward, subscriptions to the stock of the company were made to a large amount.

The persons thus subscribing had no reason to suspect that the stock taken by Cushman & Hardin stood upon any different footing from that which they received. They had a right to suppose that the 20 per cent upon these 5,500 shares had been paid in, to remain permanent assets of the company for the payment of its debts, and that the remaining 80 per cent was, equally with the 80 per cent of the stock for which they subscribed, liable to be called in to supply any deficiency.

All subscriptions are presumably upon the same basis, and all shares entitled to the same benefits and subject to the same burdens. In the subscription of each person every other subscriber has a direct interest.

There purported here to have been a large amount of stock taken, whereas, in fact, there was really no stock taken — the issue of the shares to Cushman & Hardin being coupled with the right on their part to surrender them and take back their money. Such a private arrangement with an individual subscriber, although it may not be intended, is, in law, a fraud upon the other subscribers; and such agreement will be disregarded, and the party be held bound to all the responsibilities of a *bona fide* subscriber. This is the doctrine, as we regard, abundantly established by judicial decisions.

In the case of *Blodgett v. Morrill*, 20 Vt. 509, Morrill had subscribed, with other, for the purpose of erecting a church building, upon the understanding made with the agent procuring the subscriptions, that he should not be required to pay, and he attempted to set up that understanding as a defense to an action to recover the amount of his subscription, and the court says: "Such contracts are always void as to those persons whose rights are attempted to be affected by the fraud. Here, the alleged fraud consisted in the alleged agreement not to enforce the subscription. * * * The rest of the association knew nothing of any such secret agreement. The defendant knew the subsequent subscribers were to be decoyed by his name. Clearly, then, he ought to be held to his contract. And the only sure mode of defeating the contemplated fraud is to compel the defendant to do as he gave the other members of the association to believe he intended to do."

Melvin v. Lamar Insurance Company.

In the case of *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124, Eastman subscribed for stock, and took an agreement, in writing, that he might, within one year, surrender a part of the shares taken by him, and be discharged. The court held such secret agreement void, as a fraud upon other subscribers, and that among the subscribers themselves the subscription was to be regarded as an agreement with every other subscriber to bear that proportion of the common burthen to which the subscriber professes to bind himself by the contract which he holds out to them as his contract with the corporation.

In *Robinson v. Pittsburgh and Connellsville Railroad Co.*, 32 Penn. St. 334, it was held to be no defense to an action to recover a subscription to the stock of a railroad company, that it was made at the request of the president of the company, with the understanding that the defendant was not to pay for or hold the stock subscribed for, and that the same would be canceled; that such an agreement would be a fraud on the company, and on all subsequent subscribers, and whilst the defendant might reap no advantage from it, he would be held to all the responsibilities of a *bona fide* subscriber.

It was said in *Graff v. Pittsburgh and Steubenville Railroad Co.*, 31 Penn. St. 489, that a subscription to a joint-stock company is not only an undertaking to the company, but with all other subscribers, and even if fraudulent as between the parties, is to be enforced for the benefit of others in interest.

In *Stanhope's case*, L. R., 1 Ch. App. 161, the directors of a company made an arrangement with a shareholder that on payment of a certain sum of money his shares should be forfeited for non-payment of a call which had been made. The money was paid and the shares transferred to the company. Twelve years afterward the company was wound up, and two years later still an application was made to place the shareholder's name on the list of contributors. The court held that the shareholder's name ought to be placed on the list, as the arrangement was not within the power of the directors and was a fraud on the other shareholders; and see *Mangles v. Grand Collier Dock Co.*, 10 Simons, 519; *Preston v. Same*, 11 id. 327.

“ But if the subscription were feigned and fraudulent, the subscriber, actual or pretended, is still bound to comply with all the terms and responsibilities imposed upon him, in the same manner

Melvin v. Lamar Insurance Company.

as if he were a *bona fide* subscriber," per STORY, J., in *Minor v. The Bank of Alexandria*, 1 Pet. 46.

An agreement giving the privilege of paying up a stock subscription in goods or otherwise, except in money, as contemplated by the charter, will be considered as a fraud upon other stockholders, and payment may be enforced in money. *Henry v. Vermillion and Ashland Railroad Co.*, 17 Ohio, 187; *Downie v. White*, 12 Wis. 176.

This court said in *Chandler v. Brown*, 77 Ill. 333, "Each stockholder has a vested right in the contract of subscription of every other stockholder."

The subscribed capital stock of a corporation, as also all its other property, is a trust fund for the benefit of the general creditors of the corporation, and its governing officers cannot, by agreement with a stockholder, release him from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing for a valuable consideration. *Sawyer v. Hoag*, 17 Wall. 620; *New Albany v. Burke*, 11 id. 96. And no more can they do so, we conceive, to the prejudice of stockholders. See, also, *Selma and Tennessee Railroad Co. v. Tipton*, 5 Ala. 787; Ang. and Am. on Corp., §§ 146, 535, 600; 1 Redf. on Railways, 206.

It is insisted by counsel for defendants in error that the authorities cited are distinguishable from the present case, in that they are cases where the subscription itself was unconditional, and it was sought to be avoided by setting up a collateral agreement, either made by parol or by some other disconnected writing; whereas, here, the conditional character of the subscription appears upon the face of the subscription itself—the written contract of Sept. 17, 1869; that a party has a right to make any condition he pleases to a subscription, provided the condition is expressed in the contract; that what he is forbidden to do, is to make an unconditional subscription, accompanied by a secret stipulation, parol or written. There would be more force in this position, did the transaction rest entirely in the contract of Sept. 17, 1869. Then, the only evidence of Cushman & Hardin's connection with the stock would show that they were *only conditionally* connected with it, and it might plausibly be said that subsequent subscribers for stock could not be deceived or misled thereby. . But there is more than that contract. There were certificates of stock issued in the usual form, and it so appeared upon the books of the company.

Here were the evidences of the right in the stock. They were

Melvin v. Lamar Insurance Company.

unaccompanied by any sign of a condition. They showed the stock taken to be real, *bona fide*, absolute stock—the same as all other issues of shares of stocks. It is, we think, upon these latter evidences, the certificates of stock, and the books of the company showing their issue, that others would be entitled to rely, and rest upon, as showing the character of the stock taken; and that they should not be held bound to go back and take notice of an antecedent individual contract existing between the directors of the company and the takers of the shares. This being so, there would be here the same evil—the liability to be misled and deceived by these unconditional certificates of stock, and their so appearing on the books of the company—as there is in the case where there is but a mere subscription, and the unconditional subscription is accompanied by a separate, collateral agreement qualifying it. The absolute character of the certificates of stock is sought to be qualified by a separate individual contract, in the same manner that, in the other case, an unconditional subscription of stock is attempted to be qualified by a separate collateral agreement. The qualifying agreement would seem to be of as secret a nature in the one case as the other.

We must think that this case is brought within the principle of the authorities referred to, so as to render them applicable and of controlling effect.

It is said that the subscriber to the stock of an organized company is bound to know the state of the records of the company; and that every person who subscribed here was bound to know what this contract of September 17, 1869, was. The record book of the company was destroyed in the fire, in Chicago, of October 8 and 9, 1871. There is conflicting evidence whether the contract was spread upon the records of the company or not. But assuming that it was, it would be most unreasonable to hold that the subscribers to the stock of this insurance company, scattered abroad as they were, should be held to be bound by any presumed notice of what was being done by the directors of the company, in the city of Chicago, in matters affecting their interests as such stockholders. In *Stanhope's case*, above cited, it is held that the shareholders in a company are not bound to look into the management, and will not be held to have notice of every thing which has been done by the directors, who may be assumed, by the stockholders, to have done their duty.

Melvin v. Lamar Insurance Company.

It is supposed by counsel for defendants in error that it was necessary that the complainants in the court below should have made proof that they were influenced, in subscribing for the stock of this corporation, by this pretended subscription of Cushman & Hardin, and it is said they have failed in doing so.

We see no distinct proof of this. But it must be supposed that they and other subscribers were thus influenced by the amount of the subscriptions which had been made to the stock of the company, a part whereof was this large amount taken by Cushman & Hardin.

Holding, as we do, that this option to surrender these shares of stock, and take back the money and securities, was invalid, and to be disregarded as a fraud against the other stockholders, the transaction of the directors of the company in the cancellation of the stock, and repayment of the money and securities, must be held here as of no effect.

It was not an independent, fair dealing in respect to the stock for a valuable consideration, but it was action had under the contract only, and but the allowance and carrying out of the exercise of the option of the contract, and equally invalid with the option itself.

[The court then decided that a committee appointed by the directors to "collect the assets" and wind up the company, had no power to release the claim against defendants.]

It follows, from what has been said, that this \$110,000 was wrongfully withdrawn by Cushman & Hardin from the company, and should be refunded by them; that the cancellation of the 55,000 shares of stock, issued to Cushman & Hardin, should be disregarded, and they still be regarded as stockholders in respect to such stock; and in any assessment upon the stock of the company, those shares should be assessed equally with all the other stock. The decree, so far as respects Cushman & Hardin, will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

CASES

IN THE

SUPREME COURT

OF

IOWA.

**STODSHILL V. CHICAGO, BURLINGTON AND QUINCY RAILROAD
COMPANY.**

(43 Iowa, 28.)

Railroad — right of way — diversion of stream — assessment of damages.

An assessment of damages for land taken for a railroad does not cover damages occasioned to the owner by the diversion of a natural stream of water, although such diversion is necessary to the proper construction of the road-bed

ACTION for damages for the diversion of a stream.
A Plaintiff alleged that he was the owner of a farm, crossed by a natural stream, which stream he had for years used to water his stock, and that the defendant had wrongfully diverted said stream from its natural course and prevented its flowing over his said farm, whereby he was deprived of the use thereof.

The defendant alleged that they had purchased and paid for the right of way over said farm ; that said right of way passed twice over said stream within a short distance, thereby necessitating two bridges or the filling of the channel and the diversion complained of ; that bridges increased the danger of travel, and that due regard

Stodghill v. Chicago, Burlington and Quincy Railroad Company.

for safety required them to divert the stream as they had a right to do under the grant of the right of way to them.

At the trial the court charged as follows, after having refused contrary instructions asked by the defendant :

“ If the said North Avery creek is a natural stream of water crossing the defendant’s right of way and the plaintiff’s premises, then the defendant would not have the right in law to divert the stream and change the channel so as to throw it off the plaintiff’s premises, and if they have done so they would be liable therefor.”

Verdict for the plaintiff. Defendant appeals.

Stiles & Burton, for appellant.

H. B. Hendershott and Wm. McNett, for appellee.

ADAMS, J. As it is not claimed by the appellant that greater rights were acquired by the plaintiff’s deed than would have been acquired by proceedings in condemnation, we shall assume, for the purposes of this opinion, that they were the same. The question, then, which we are called upon to decide is this : Are the damages resulting to the land-owner from the diversion of a natural stream of water where such diversion is required by good railroading and a reasonably prudent construction of the road-bed, to be regarded as having entered into and been covered by the condemnation and appraisal ? If this question is answered in the affirmative, the defendant, under the testimony offered and excluded, was justified in diverting the stream in question.

In *Sabin v. Vermont Central Railway Co.*, 25 Vt. 363, the plaintiff, who was the owner of land through which the defendant had acquired a right of way, claimed to recover for damages sustained by reason of rock being thrown upon his land by blasting in the construction of the road. It was held that it must be presumed that the commissioners, in appraising the right of way, estimated and allowed for such incidental damage, and that the plaintiff could not recover. The court said : “ It seems to us very obvious that the right of the defendant to blast these rock in a reasonable and prudent manner did exist, and was conferred by the decision of the commissioners in appraising the plaintiff’s damages. And if we test the extent of that adjudication by the ordinary test of the extent of judgments in merging claims, namely, that every claim is barred which is presented under the particular

Stodghill v. Chicago, Burlington and Quincy Railroad Company.

question before the commissioners, there will be little ground of question remaining. The plaintiff had the right to claim, and was, of course, bound to present his claim for all damages he was likely to sustain, not only in the running of the road, by fires of engines, and the like, but in the building of the road in the ordinary mode where blasting is universal, and this not in respect to the land taken only, but of the remaining land, as has been repeatedly decided. And if this claim was not presented when it might have been, it was barred upon general principles universally recognized that no one shall again be called in question for what was, or what might be, and should have been, adjudicated."

In *Proprietors of Locks and Canals v. The Nasnua and Lowell Railroad Co.*, 10 Cush. 385, Chief Justice SHAW undertakes to state what are the proper subjects for the assessment of damages in condemning a right of way, and among them he enumerates "the draining of wells, and the diversion of water-courses, so far as they are the necessary results of suitable and proper works to accomplish the enterprise, and secure the public easement." In *Aldrich v. Cheshire Railroad Co.*, 1 Foster (N. H.), 359, the declaration alleged "that upon the plaintiff's farm in Westmoreland, there was a permanent spring which supplied the plaintiff's house and barn with water, and irrigated his land, and that the defendant by excavations diverted the water from its accustomed course to the injury of the plaintiff." The evidence showed that the defendant made an excavation through the plaintiff's ground about fifteen feet deep, and that upon making such excavation the spring disappeared. It was held that the plaintiff could not recover, for the reason that it must be presumed that the damages, though not foreseen, were included in the commissioner's appraisal.

Do the foregoing authorities support the doctrine contended for by the appellant in this case? If they do, and if such is the law, we see no way to avoid the conclusion that it is the duty of commissioners, appointed to assess the damages for a right of way, to include in the appraisal all damages which the land-owner might sustain, by the diversion of a stream crossing the railroad track, whether such diversion would result in depriving a farm of stock water, or in the destruction of a mill and mill privilege. The only way to protect the land-owner against what the company might do, would be to assume that the company would prefer to pay the damage, however great it might be, and have the privilege of cut-

Stodghill v. Chicago, Burlington and Quincy Railroad Company.

ting a new channel and filling across the stream, rather than to bridge. It may be said that the commissioners should assess damages for diverting the stream, whenever, in their opinion, it will become necessary for the company to divert it, and not otherwise. But this rule would be impracticable for two reasons: 1. The question of diverting a stream and filling to save the cost of bridging is a question of civil engineering. 2. There is no necessity in any case of diverting a stream to save bridging, except in view of greater economy and safety. As to economy, that would depend largely upon the damages which the company should be adjudged to pay for the privilege of diverting it. In this case the company paid one dollar for whatever rights were acquired. Had there been an assessment of damages with a view to the stream's being diverted, the damages for the diversion might have been adjudged to be such that the company would have deemed it far from economical to pay them and take the privilege. It is not certain, then, whether a railroad company wants to take, and pay for, the privilege of diverting a stream or not. Here then is the difficulty in the rule which appellant contends for. In *Sabin v. Vermont Central Railway Co.*, it is said that the assessment of the commissioners is like an adjudication of court in this, that the land-owner is conclusively presumed to have presented every claim he had for damages, as a plaintiff in a suit in court is conclusively presumed to have presented every claim which he could present under his petition. This is undoubtedly correct, and the analogy will help us. The company applies for a right of way. It wants a certain number of feet of ground. It wants the privilege of excavating whenever it may be necessary and at the risk of draining any springs in the immediate vicinity, if that should be the result.

It wants the privilege of blasting through rock wherever it may be necessary, and at the risk of throwing pieces upon the adjacent land, and it offers to pay for these privileges whatever the commissioners shall adjudge to be right. All these things are implied in the company's application for a right of way, and hence it will be presumed that they were considered by the commissioners. But when the company comes with its application for a right of way across land which is crossed by a stream of water, does the company by necessary implication say that it wants to take and pay for the privilege of diverting it, when such diversion would destroy a mill privilege, or even the land-owner's stock water? We think

McPherson v. Foster.

not. If there is no necessary implication in the application that the company asks, and offers to pay for such a privilege, then the appellant's theory is not maintained, that proceedings in condemnation or deed of right of way necessarily grant such privilege.

As to the question of safety to life and property, it may be conceded that, as a general rule, safety is promoted by the reduction of the number of bridges. But such reasonable degree of safety as the public requires is secured upon railroads with bridges as well as without.

There is nothing, then, either in the matter of economy or safety that enables us to say that railroad companies by implication apply for the right to take and pay for the privilege of diverting whatever stream of water they cross, if they may save a bridge by so doing. There might be a case where the diversion of a stream to some extent would be absolutely necessary. In such case, if there should be one, the company would have no alternative but to take the right and pay for it. Their application would by implication cover such right.

We must presume that Chief Justice SHAW had in mind such a case, in what we have quoted from his opinion in *Proprietors of Locks and Canals v. Nashua & Lowell Railroad Co.* At all events the case before him was not a case of the diversion of a stream, nor did it strictly call for an enumeration of the injuries that would by implication be covered by the commissioner's assessment of damages. Our attention has been called to no case which seems to us to conflict necessarily with the views which we have above expressed.

Affirmed.

MCPHERSON v. FOSTER.

(43 Iowa, 43.)

Constitutional law — municipal bonds — over-issue.

Municipal bonds issued to an amount beyond that limited by the Constitution and the statutes, but otherwise lawful, were transferred to *bona fide* holders for value. *Held*, (1) that the bonds issued in excess of the limit were void; (2) that the bonds were valid to the amount and (they all being issued as a part of one transaction) a recovery may be had on any bond for such proportion of its face as the maximum issue authorized by the Constitution bears to the whole issue, and (3) that a tax levied to pay the bonds was valid only for the amount authorized.

BILL in chancery by residents and tax payers in the Independent School District of Steamboat Rock, Hardin county, for themselves and others, to restrain the county treasurer from collecting a tax of four per centum levied to pay the principal and interest of bonds issued by the corporate authorities of said district, and to have said bonds and the coupons thereto declared to be void.

The petition showed that in 1869 the officers of said school district entered into a contract with the defendants for the building by them of a school-house, for which they were to receive the bonds of the district to the amount of \$15,000 with interest; that the school-house was built and the bonds issued; that at the time the taxable property of the district, as shown by the last assessment, was \$49,650, and an indebtedness of \$450 existed upon the school corporation; that under the Constitution and laws of the State, its indebtedness was limited to five per centum upon the taxable property, as shown by the last assessment, which would amount to \$2,482.50, and deducting therefrom the existing debt above named, the limit to which the district could extend its indebtedness was \$2,057.50; that in 1871 the directors of the school district levied a tax of four per centum upon the taxable property of the district, for the purpose of paying the principal and interest of the bonds, while at the time the greatest amount of taxes that could be levied under the law was one and one-half per cent. The tax so levied had been placed upon the county tax books, and the treasurer was seeking to enforce the collection and for that purpose was about to advertise the real estate of the tax payers for sale. It was further shown that a tax of one per cent for the year 1873 had been levied by the school board to pay the interest on the bonds. Foster Brothers, the officers constituting the board of directors of the Independent School District of Steamboat Rock, the treasurer of Hardin county, and certain others alleged to be holders of the bonds, were made defendants to the action.

The answer of the defendants, after admitting or denying certain allegations of the petition, which need not be here mentioned, proceeded to allege certain facts, as the extent of the territory covered by the school district, the value of the taxable property therein, the number of inhabitants and of the children within the age for attending school, the necessity existing for a school-house and other matters of that kind.

McPherson v. Foster.

It alleges, further, that an election by the voters of the district was had, and the proposition for the issue of the bonds to be used in the erection of the school-house was adopted. It is also averred that the people and tax payers of the district favored the erection of the school-house, and had full notice thereof, and when completed it was received and accepted by the district, and has since been used for the purposes of a school; that it is well built and worth the cost of its construction, and that a large amount of the tax levied for the payment of the bonds and interest has been collected and misappropriated by the school district. The answer showed that the bonds were all held by John Mosher, who was made a defendant, and the School Furniture Company of Sterling, Illinois. The answer was made a cross-bill, and in addition to general equitable relief, it prayed that an account be had of the amount due upon the bonds, and judgment be rendered therefor against the district, and that the officers of the district be required to pay the amount settled by such judgment, etc., etc.

The cause was sent to a referee, and, upon the coming in of his report, a decree was rendered, which, so far as it provides relief, is in these words: "And it is further ordered that all taxes collected or levied for or on account of the said bonds so issued as aforesaid, as to pay the coupons of said bonds, must be preserved intact until disposed of by order of competent authority, in a suit where all necessary parties are before the court, provided that this decree in no way includes the three per cent tax illegally voted, and levied by the board of the independent district, May 12, 1871, which is void and subject to be refunded whenever so ordered by the proper officer;" * * "and the court finds that many of the bonds, at least, were issued without authority of law, and the officers of the independent district are hereby enjoined from paying any of said bonds, or any of the interest coupons of said bonds, until an adjustment is made of the rights of all the parties, in conformity with the legal and equitable rights of all, or until all parties shall be brought into court, and their rights adjusted and determined."

The abstract does not show that either party appealed. It is admitted in the arguments of counsel, on both sides of the case, that plaintiffs appeal. Defendant's counsel in their argument insist that defendants appeal, but this is denied by plaintiff's counsel.

E. W. Eastman, for plaintiffs. The bonds in suit constituting a
VOL. XXII. — 28

contract, if any part of them are illegal, they are all illegal. 2 Pars. on Cont. 517-519. The school-house being built on the land of the district, it was bound to receive it as it was, and was not compromised by so doing. *Hodges v. Buffalo*, 2 Denio, 110; *Smith v. Bristol*, 33 Iowa, 24. A municipal corporation is an auxiliary of the government; or, more properly, a part of the government itself. 2 Kent, 274; *Clapp v. County of Cedar*, 5 Iowa, 15. It is not subject to a suit, unless authorized by statute. *Riddle v. Props., etc.*, 7 Mass. 69; *Mower v. Leicester*, 9 id. 250. It derives all its powers from the law, and can do only what the law authorizes it, in terms or by implication. *Stokes v. Scott Co.*, 10 Iowa, 172; *Carter v. Dubuque*, 35 id. 416. The officers of a municipal corporation can bind the corporation only to the extent of the authority conferred by statute. *Taylor v. Dist. Tp. of Wayne*, 25 Iowa, 447; *Reichard v. Warren Co.*, 31 id. 381; Cooley's Const. Lim. 215. The holder of the bonds cannot recover from the district. *Manning v. Dist. Tp. of Van Buren*, 28 Iowa, 336; *Brady v. Mayor of N. Y.*, 20 N. Y. 317; *Clark v. Polk Co.*, 19 Iowa, 248; *Zottman v. San Francisco*, 20 Cal. 96. If the board had not the power to make the contract, they had not the power by any subsequent act to make it binding upon the district. Their acts must be done in the manner provided by law. *Swift v. Williamsburg*, 24 Barb. 427; *Leavenworth v. Rankin*, 2 Kan. 357. Those who deal with the officers of a municipal corporation are bound at their peril to know the powers of the officers. Story on Agency, §§ 307, 319; *Mech. Bank v. N. Y. & N. H. R. R.*, 3 Kern. 599; *Andover v. Grafton*, 7 N. H. 202; *Necder v. Lirna*, 10 Wis. 280; *Dively v. Cedar Falls*, 21 Iowa, 565. No action will lie against the district on account of these bonds. *Brady v. Mayor, etc.*, 20 N. Y. 317; *Manning v. Dist. Tp. of Van Buren*, 28 Iowa, 332. The making of the contract and issuing the bonds was not the act of the district but of individual persons, for which they may be made personally liable. Story on Agency, §§ 133, 307, 319, 320; Cooley's Const. Lim. 211.

Porter & Moir, for defendants. If a void contract be partially executed and completion be refused, the obligee may have his action upon an implied promise to pay for the thing transferred. *Thomas v. Dickinson*, 14 Barb. 90. The courts of New York have applied this doctrine to illegal or void contracts. *Like v. Thompson*, 9 Barb. 315. A party will not be allowed to rescind a contract where

McPherson v. Foster.

he has received a partial benefit therefrom. *Hunt v. Singer*, 1 Daly, 209; *Sinclair v. Talmadge*, 35 Barb. 602. If the vendor has executed the contract, to effect a rescission the vendee must return the property or offer to do so, and no fraud on the vendor's part will be a complete bar to an action for the price. *Kneedler v. Sternberg*, 10 How. 67; *Stevens v. Hyde*, 32 Barb. 171; *Johnson v. Barney & Co.*, 1 Iowa, 531. Where a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has the right to presume they were issued under circumstances which give the requisite authority. *Lexington v. Butler*, 14 Wall. 282; *Lynde v. Winnebago Co.*, 16 id. 6; *National Bank of Washington v. Texas*, 20 id. 72. The purchaser of municipal bonds is not obliged to look beyond the records, and if it appears that they are issued under authority of law, he is justified in purchasing. *Clapp v. County of Cedar*, 5 Iowa, 15. That these bonds are valid and binding upon the district, see *Stoney v. The A. L. Insurance Co.*, 11 Paige's Ch. 635; *North River Bank v. Agmar*, 3 Hill, 262; *Bissell v. M. S. & N. I. R. R.*, 22 N. Y. 252; *Gelpcke v. Dubuque*, 1 Wall. 203; *White v. R. R. Co.*, 21 How. 575; *Craig v. Vicksburg*, 31 Miss. 216. A corporation cannot stand by and by its silence permit others to assume onerous obligations and then afterward defeat the claims its own conduct has superinduced. *Zabriskie v. C. C. & C. R. R.*, 23 How. 381; *Griswold v. Haven*, 25 N. Y. 595. Bonds issued by a municipal corporation on time, negotiable in form, under legislative authority, are negotiable and subject to no equities when the power to issue exists, in the hands of *bona fide* holders. Dill. on Mun. Corp., § 405.

BECK, J. [After noticing some unimportant points.] IV. Code, § 1821 (Acts Twelfth General Assembly, chap. 9, § 1), is in these words: "Independent school districts shall have the power and authority to borrow money for the purpose of erecting and completing school-houses, by issuing negotiable bonds of the independent district, to run any period not exceeding ten years, drawing a rate of interest not exceeding ten per cent per annum, which interest may be paid semi-annually; which said indebtedness shall be binding and obligatory on the independent district for the use of which said loan shall be made; but no district shall permit a greater outstanding indebtedness than an amount equal to five per cent of the last assessed value of the property of the district."

The Constitution of this State contains the following inhibitory provision: "No county, or other political or municipal corporation, shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent on the value of the taxable property within such county or corporation, to be ascertained by the last State and county tax list, previous to the incurring of such indebtedness." Art. XI, § 3.

It is clearly established by the evidence in this case that the taxable property of the district, as shown by the tax list contemplated in the foregoing provisions, amounted to \$49,650. Five per cent upon this sum is \$2,482.50. The debt existing at the time against the district was \$425. The limit of the indebtedness which, under the Constitution and the statute, could be contracted by the district was \$2,057.50. We must now inquire into the effect of this violation of law, constitutional and statutory, upon the validity of the bonds.

The evidence shows that the bonds have passed out of the hands of Foster Brothers, and are now held by those who were strangers to the contract between them and the district. It is not shown that the holders of the instruments had express notice of the illegality of their inception, or of any infirmity charged against them, nor are there any facts shown which should have put the holders upon inquiry that would have led to the discovery of the infirmities of the paper. Those who now own the bonds must be regarded as innocent holders, if holders of this paper under any circumstances can be called innocent.

The question presented for our consideration is this: "Is the independent school district, a corporation existing under the laws of this State, liable to a *bona fide* holder of its bonds, issued for a sum exceeding the amount of the indebtedness which is restricted by the Constitution and statutes of the State."

The statement of the question suggests that there are two subjects of inquiry to be pursued:

1. What is the effect of the inhibitory constitutional and statutory provisions upon the indebtedness which exceeds the prescribed limits?

2. Do these restrictions invalidate that part of the indebtedness which is within the limits, in case the whole debt is created by the same act and for the same purpose?

V. It has not been and cannot be claimed that the part of the indebtedness in excess of the constitutional limit is made valid

McPherson v. Foster.

because a part of it is not beyond that restriction. If the indebtedness would be invalid in case no part of it is within the limit, it appears plain that if a part of it be within, the part without is not cured of illegality. This thought demands no further expansion.

VI. We will now proceed to the consideration of the question involving the validity of the indebtedness which is beyond the sum the corporation may, under the Constitution and statute, lawfully bind itself to pay.

I am unable to discuss the question in language and manner more satisfactory to myself than by repeating what I have heretofore said upon the subject. In 1871 the precise question was before this court in a case then pending here. The duty of preparing an opinion, expressing the views of a majority of the court upon the question, was assigned to me, which I then discharged to the satisfaction of my brothers who agreed with me. The cause was settled or dismissed before decision, and the opinion I wrote was not filed. It was presented to the profession through one of the law journals of the day.* I now, availing myself of the labor and research I then bestowed upon the subject, reproduce it here. It is not improper further to add, that the recurrence of the question in this case has imposed upon me the duty of re-examining it, which I have tried faithfully to discharge; and the criticisms, favorable and unfavorable, which have been made upon my former discussion of the question, have stimulated my later examinations into the correctness of the conclusions I had before reached.

The opinion I am about to introduce, after a statement of the question under consideration, refers to that provision of the Constitution of the State above quoted, limiting municipal and corporate indebtedness, and then proceeds in the following language, using the term "city" to describe the corporation whose acts were the subject of consideration:

This limitation, we argue, is a direct and positive prohibition, and unquestionably, we think, deprives the city of all power to issue obligations in violation thereof. A moment's consideration will make this position plain.

VII. The city, as all other municipal corporations, can exercise no power not conferred by law; upon the law, from which its existence is derived, it depends for all authority. It is a creative and positive enactment, and all the city's powers flow therefrom. Of course we will not be understood as intimating that the means

and manner of the exercise of power must be prescribed by express enactment, but that the power itself depends thereon. *Clark v. City of Des Moines*, 19 Iowa, 199; *Reichard v. Warren County*, 31 id. 381; *Clark, Dodge & Co. v. The City of Davenport*, 14 id. 494; *Booth v. Town of Woodbury*, 32 Conn. 118; *Webster v. Town of Harvington*, id. 131; *Alley v. Inhabitants of Edgecomb*, 53 Me. 446; *Leavenworth v. Norton*, 1 Kan. 432; *Kyle v. Malin*, 8 Ind. 34; *Ex parte Burnett*, 30 Ala. (N. S.) 461; *Hooper v. Emery*, 14 Me. 375.

VIII. An act of a municipal corporation, done in an attempt to exercise power not possessed by it, is void. This is a corollary of the doctrine just announced. If it were not so, power could be exercised which is not possessed, and the corporation would possess authority independent of the legislature—a proposition contrary to the doctrine above stated, which is well supported by principle and the cases.

IX. There is no distinction in reason between the cases of entire absence of enactment conferring power, and a prohibition of its exercise beyond a certain limit. They are in fact one and the same case. In the first instance power is not granted, and is not, therefore, possessed; in the other it is expressly withheld, and its exercise prohibited, and is, therefore, not conferred. There is in each case a total absence of authority. The same is true where power is granted upon conditions. They must be complied with before the power passes to the corporation. It is equally plain that if power be conferred to be exercised to a certain extent and no farther, when the limit is reached, the power ceases. These principles are evident, and do not require the support of authority. No other rules would keep corporations in subordination to the State, or be in harmony with the fundamental doctrine above announced, namely: all power of corporations is derived from positive enactment.

In the case before us, the city is authorized to create an indebtedness to a certain extent, and is expressly prohibited from exceeding such limit. Its officers may issue its bonds upon the condition that the whole indebtedness, including that to be created by the obligations in question, shall not exceed five per cent upon the taxable property within the city. This is an express limitation upon, and a condition annexed to the exercise of power. The case is within the rules above stated.

McPherson v. Foster.

These doctrines are well sustained by authority, and are not now for the first time recognized and applied by courts. The case of *Reichard v. Warren County, supra*, is not unlike in principle the one before us. In that case the limit, as provided by statute, upon the power of the county to expend money in building a court-house, was a vote of the people. A contract was made for the expenditure of a larger sum than was voted, under which the plaintiff claimed recovery. It was held that the contract had no binding force, for the reason that it exceeded the limitation imposed by the vote of the people upon the power of the county. There are numerous cases in the reports where acts of counties and municipal and other corporations have been held void, because they exceeded the power conferred upon those bodies. We are not aware that a contrary doctrine has been anywhere recognized. It is admitted by every one that, "If the bonds were issued without any authority to issue bonds, they would be clearly void." But some insist, "If the power to issue exists, and is irregularly exercised, or is exercised in disregard of conditions and limitations, the *bona fide* holder is protected." We have established above that a condition or limitation upon a power whereby it ceases at a certain point, as effectually defeats its exercise beyond the limit, as though no power had been granted at all. The statement of the rule, as admitted, is utterly inconsistent with the exception insisted upon. When the limitation is passed, there is the same absence of power as though none had ever been conferred; otherwise the condition in limitation would be without effect.

X. It is insisted that if the bonds are issued and negotiated without objection by any one, they are, in the hands of *bona fide* holders, without notice of their infirmities, binding upon the city. This position is based upon the argument just noticed and the supposed injustice of a contrary doctrine. It is argued that if, by the silence of the inhabitants of the city, the bonds are permitted to be issued and put upon the market, it will operate to the injury of the innocent purchasers, and the inhabitants ought to be concluded; and in this view it is insisted, while admitting that, if the bonds were issued without authority, they are void, that the city is bound by them as the limitations and conditions which circumscribed their power have only been overstepped. Several cases are sometimes cited to support this position. Some of them, in our opinion, fail to do so. It appears in those cases that the power was conferred

XIII. An argument in support of the position, that such bonds are valid in the hands of *bona fide* holders, is based upon the doctrines governing principals and agents, which, it is insisted, are applicable to the case we are discussing. The municipal authorities, it is claimed, are the agents, the city is the principal, and its charter or the law in question, the power of attorney. It is said that the law gives the city authorities power to create an indebtedness to a certain extent. They may create a debt but are limited in the exercise of the power as to its extent. Now, applying the rules fixing the liability of a principal, it is claimed that, as the city authorities have the power to create a debt, the city will be liable upon the indebtedness, when held by innocent parties, even though the limit upon the exercise of the power be passed in its creation. The fallacy of this argument is at its very foundation. The restriction in the law in question is not upon the power of the city officers, the agents as they are considered; it is upon the city itself, which in the argument is made to represent the principal. By the Constitution the city is forbidden to contract the indebtedness. Power is not only withheld but a prohibition is placed upon its exercise. Applying the theory of principal and agent as suggested, we have the case of an act done by an agent, which the principal has no power to do, regarded as valid, because it was done by an agent, a result that cannot be admitted.

It is readily seen that the rules relating to principals and agents have no application to the question we are considering, and do not even serve to illustrate the principles involved. The city authorities execute the power granted to the city, not as agents, but in the discharge of the functions of the municipal government. The municipal power is exercised through the city officers. They are instruments for the exercise of the power conferred by the city charter. They constitute the government of the city. They derive their authority from the charter, not from an ideal being called the city. The constitutional prohibition acts directly upon them.

In weighing this argument the nature and effect of the constitutional inhibition upon the city to issue the bonds must not be overlooked. It is a prohibition upon the exercise of the power, by forbidding the legislature to confer authority upon municipalities to create indebtedness beyond a certain limit. The creation of such an indebtedness is not only unauthorized but illegal and contrary to the settled policy of the State, as declared in the Constitution. Will

McPherson v. Foster.

the assent of the people of the city, in their corporate capacity, make the bonds valid? Certainly not. That assent was given by the act of the municipal government in issuing the bonds. It must be admitted that the mere issuing of the bonds does not make them valid. Now suppose every tax payer, or every resident of the city, had in the most formal and solemn manner declared his assent to the issuing of the bonds, or after they were issued, to their validity, would such action authorize any court to declare the bonds valid? If so, we must admit that the people of the city may, by their voice, annul the Constitution of the State, or the limitations of the charter. But this will not be pretended for this obvious reason: the Constitution prescribes rules of law in regard to the government and policy of the State that are supreme. Whatever is in conflict therewith, the courts must regard as illegal and not of binding force, even though the people of the localities particularly affected thereby should, in a formal manner, assent thereto. Constitutional prohibitions cannot be removed by such assent.

The Constitution provides that the general assembly shall make no law respecting the establishment of religion, or providing religious tests, as qualifications for officers of public trust. Now suppose that the general assembly should, by law, permit the municipalities of the State to establish religion within their respective limits, or provide religious tests? Would it be claimed that the courts must sustain the acts of a corporation in the exercise of the power thus granted to it, on the ground that all of the people of the city assented thereto? No one will maintain such a doctrine. The people of a city cannot make for themselves such laws. Being in conflict with the Constitution, which, until it be changed or abrogated in the manner therein prescribed, is paramount to the will of the people, we would declare laws of this character void, even though every being in the State affected thereby should assent to them. For the very same reason the courts must declare void the act of a city in issuing the bonds in question, even though it were done with the consent of all the citizens and tax payers. Being against the policy of the State as declared in the Constitution, it cannot be made valid.

The argument under consideration is based upon the position that the inhabitants of a city by their silence are estopped to deny the validity of the bonds; that having failed to object to them at a proper time, their assent will be presumed. It will be conceded

that such implied assent can have no greater effect to make the instrument valid, than consent expressly given, which we have seen will not so operate.

In support of opposite views, cases are sometimes cited where acts of corporations not within the scope of their express power are held not to be *ultra vires*. These are cases where the power exercised is authorized for a particular object, or the acts in question are required to be done in a particular manner, but the object and manner of the exercise of power are different from and in conflict with the charter of the corporations. It is held that such acts are not *ultra vires*. In these cases it will be remarked that the acts in question are authorized; the restrictions therein relate to their object or manner. The cases are, therefore, quite different from the one under consideration, in which the restriction is imposed upon the very exercise of the power, without regard to the purpose or manner of its exercise. Suppose the charter of a city should authorize money to be borrowed to build a railroad. The money is borrowed but is expended in paving a street. The power to borrow money being conferred, the use of the money after it is borrowed could not affect the validity of the act of borrowing done in pursuance of the power.

In the case of *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, sometimes cited and relied upon as an authority in point against our view, a private corporation, for the purpose of consolidating its business and property with another corporation, conveyed all its lands. It was held that, as it had the power to convey its property for some objects, the purpose for which the conveyance was made, though admitted to be without the general scope of its power, did not invalidate the act. The case recognizes no principle in conflict with the views we have above announced, but on the contrary contains reasoning in their support. The following extract from the opinion of the court in that case, announced by Chief Justice SAWYER, very happily expresses the distinction we have just attempted to point out: "The term *ultra vires*, whether with strict authority or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some spe-

McPherson v. Foster.

cific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of persons dealing with corporations may vary, according as the act is *ultra vires* in the one or other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case."

In our opinion the bonds and coupons issued in excess of the limit prescribed are void, and of no binding force against the city.

XIV. A few thoughts upon this branch of the case, in addition to the foregoing argument, I will briefly present. They are principally in reply to objections urged by counsel in this case.

It is insisted that "when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper." This in the language of the United States Supreme Court in *City of Lexington v. Butler*, 14 Wall. 282. The doctrine is recognized in other cases in the same court. But it has no application to the case under consideration. It applies to the manner of the execution of authority possessed, the proceedings preliminary to the exercise of the power, which, it may be, are expressed as conditions upon which it may be exercised, as the submission of a question to the vote of the people, or the like. The very language of the quotation expresses this thought: "the *bona fide* holder has a right to presume they (the bonds) were issued under *circumstances that gave the requisite authority*." This language presupposes that some *circumstance* or a vote confers the authority. If that be so, it will be presumed. But in the case before us no circumstances, no fact, no act done, short of an amendment of the Constitution could give the authority. In plain words the authority could be conferred in no manner. It cannot be presumed, for the law will not presume an impossibility; neither will the courts ever exercise a presumption that will annul and set

aside a law, much less the Constitution. The point demands no farther attention.

XV. That every holder of paper of this character, issued without authority, takes it with notice of its infirmities, is a doctrine that seems to be sustained upon the most familiar legal principles. The whole world must take notice of the Constitution and laws of a State. This is a rule upon which all intelligent men act. No one would think he could be excused for ignorance of the laws of a State affecting title to lands therein purchased by him. Upon no principle can the dealer in commercial paper be excused for ignorance of constitutional provisions, affecting the power of a corporation to execute such paper. He must take it at his peril. This doctrine is recognized in *The Mayor v. Ray*, 19 Wall. 468, by four justices, BRADLEY, MILLER, DAVIS and FIELD, and supported by the most cogent arguments.

XVI. It is said that since the district "had the general power to contract an indebtedness, although the amount was limited by the Constitution, and the fact of such limit being reached was a matter *in pais*, and the bonds have come to the hands of *bona fide* holders, the obligation of the city to pay is complete, although the bonds were issued in excess of such limit."* The thought expressed by this quotation is this: Since the fact that the constitutional limit of indebtedness has been passed is a matter *in pais*, purchasers of the bonds will not be chargeable with notice. It strikes the mind with but little force. A matter *in pais* is a matter not of record in a court. Of some things that are *in pais* the court will not take judicial notice. But it has never been claimed that purchasers of property, securities, and the like, are not chargeable with notice of matters which are not of record, are *in pais*. The rules in regard to matters *in pais*, and the term itself, have no application to questions affecting the validity of negotiable paper.

The purchaser of the paper in question is, as we have seen, chargeable with notice of the statute and Constitution of the State; the facts upon which the determination of the limit of indebtedness is to be made, and whether it has been reached, are all open to the world. The tax list is a county record; indebtedness of the school district is shown by its record. There can be no excuse for ignorance on the part of the purchaser of the bonds, of the facts presented and set out in these records.

* *Western Jurist*, January, 1872, page 16.

McPherson v. Foster.

XVII. It is next insisted that the district and the tax payers are estopped to deny the validity of the bonds, by their knowledge and long acquiescence in the act of the officers issuing them, and by the levy of taxes for the payment of interest, and the payment of interest upon some of the bonds. In support of this position certain decisions of the United States Supreme Court are cited. The doctrine recognized by that court is best expressed by quoting its own language: "Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company and bind itself to pay its subscription, or issue its bonds in payment, and if it does, the purchaser of such bonds is affected by the want of authority to make them. But it does not follow from this that where the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers, or the people of the county, the bonds can *always* be avoided in the hands of an innocent purchaser by proof that the county officers or the people have not done, or have insufficiently done, the things which the legislature required to be done before the authority to subscribe or to issue the bonds should be executed. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by the law and what the vote was. When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusion presumptive in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled." *Pendleton County v. Amy*, 13 Wall. 297, 304.

The presumption which is the foundation of the estoppel recognized by the court, it is clearly stated in the foregoing quotation, will be exercised only in cases when there is a grant of power. If the power be withheld, if there be no legislative grant of authority

for the exercise of the power, no estoppel will arise from the acts of the officers, or the people of the corporation.

The same court has more recently held that, in the absence of authority in a corporation to contract a debt, which was attempted under an unconstitutional legislative enactment, the payment of interest by the corporation worked no estoppel against setting up the unconstitutionality of the legislation, and the invalidity of the bonds issued thereunder. *Loan Association v. Topeka*, 20 Wall. 655.

XVIII. It is said: "If the bonds are void, and the city has received value, it would be liable to pay back what it had received from innocent persons, or else the provision of the Constitution would operate to ensnare and defraud those who deal with it; and, if thus liable, the constitutional limit may be exceeded in this way as well as by sustaining the right to recover on the bonds. Dillon on Municipal Corporations, § 88, note 2. This view presents the suggestion of an ingenious plan for setting at naught the provision of the Constitution of the State under consideration. It is commended on the ground that, if the Constitution be enforced so as to cure the evil, from which it is intended to protect the people of the State, it "would operate to *ensnare and defraud* those who deal with" political corporations. In such a case, according to the sentiment of the above quotation, the Constitution becomes an instrument of fraud, and on that ground may be violated. It must be confessed that it is a novel thought to disregard the supreme law of the State because it operates to ensnare and defraud innocent persons. The error of the quotation is based upon a partial view of the rights of those who are called innocent purchasers, and want of attention to the object and purpose of the constitutional restriction in question.

Prior to the adoption of our present Constitution, many of the counties and cities of the State had become indebted to an extent that was not only burdensome, but threatened permanently to retard their growth and prosperity. Indebtedness of this character was uniformly contracted upon the affirmative vote of the electors. It was believed sound policy demanded that a restriction be placed upon the power of counties and other political corporations to incur voluntary indebtedness. The constitutional restriction under consideration was the result of the sentiment then prevailing, which had its origin in the experience of the day.

McPherson v. Foster.

It will be observed that this restriction operates upon the political subdivisions of the State and upon the people. It is intended to prohibit the creation of indebtedness beyond the prescribed limit. All acts in contravention thereof are void. As we have shown, the provision is known to the world, and no one can be presumed to be ignorant of the invalidity of bonds issued in violation thereof. There can be no innocent purchasers of such paper issued without authority. It has been held that, where municipal bonds are issued without authority, a holder cannot recover on the ground that he is an innocent purchaser. *Pendleton Co. v. Amy*, 13 Wall. 297 (304); *Aspinwall v. Commissioners of the County of Daviess*, 22 How. 364 (379); *Marsh v. Fulton Co.*, 10 Wall. 676; *Clark v. City of Des Moines*, 19 Iowa, 199; *Marshall Co. v. Cook*, 38 Ill. 44.

Many other decisions could be cited in support of this doctrine. See cases referred to in Cooley's Constitutional Limitations, chap. 8, p. 215-16; Dillon's Municipal Corporations, §§ 108, 426.

Purchasers of these bonds, being presumed to take them with notice of the constitutional restriction that is violated by their issue, must be regarded by the law, with the people who vote for issuing the bonds and the corporations that do issue them, as violators of the Constitution in attempts to create an indebtedness forbidden by it. Surely if, in the enforcement of the Constitution, those who attempt its violation are made to suffer thereby, it ought not to be said that the supreme law of the State becomes an instrument "to ensnare and defraud" them.

The constitutional provision in question, it will be observed, prohibits the creation of indebtedness beyond the prescribed limit. It is an inhibition upon such indebtedness, however its creation may be attempted. It will cover the case of implied contract, as well as express contract by bond, or otherwise. It is aimed at the *indebtedness*, not its form. It cannot be true, then, that a *debt* could be created, because a consideration is received. It cannot, therefore, be admitted that "if the bonds are void, and the city has received value, it would be liable to pay back what it has received," for this implies that, by receiving the "*value*," a debt is created. It may be that the identical money or other thing of value paid in such cases could be recovered from the hands of the officers or agents of the political corporation while it could be reached there, on the ground that property therein had not vested in the corporation.

But upon this point we express no opinion. What we do intend to say is, that such a transaction cannot create a debt, and no recovery as for a debt can be had thereon. *Manning v. Dist. Tp. of Van Buren*, 28 Iowa, 332; Cooley's Const. Lim. 196; *Zottman v. San Francisco*, 20 Cal. 96.

XIX. The independent district could become indebted to the extent of five per cent upon the amount of the last tax list. Deducting the existing indebtedness from such sum, we find the amount of the debt it could contract was \$2,057.50. But it has attempted to contract a debt of \$15,000. We have seen that for the excess over the prescribed limit no right of action exists against the district. The question now arises, is the district liable for the amount of the indebtedness within the restricted limit. We think it is. As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of \$2,057.50 by bond. If the debt exceeds that amount, it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the non-existence of a valid debt therefor. But this restriction does not extend to the sum of \$2,057.50 for which the district had power to issue its bonds. The sum is a valid debt. The bonds to that extent are valid. It is no unusual thing for instruments of this character to be partly valid and partly invalid. So far as they secure a lawful debt they are valid. So far as the debt is unlawful, they are invalid. The case is analogous to the act of an agent which is partly within his authority and partly without. The act, so far as authorized, would bind the principal, while to the extent it was unauthorized, it would not be binding. Of such acts it is said, "When there is a complete execution of authority, and something *ex abundanti* is added, which is improper, there the execution is good and the excess only is void." Story on Agency, § 166.

It appears that the bonds all bear the same date and were issued, though at different times, as a part of one transaction. They were intended as security for a debt of \$15,000 which was attempted to be contracted in building the school-house. It cannot be said that, in justice, invalidity should attach to certain particular bonds, while others, to the amount for which the district could lawfully contract indebtedness, should be held valid. Each bond, being but a part of the whole debt, must partake alike of invalidity and validity

McPherson v. Foster.

— it must be partly valid and partly invalid. The whole alleged debt is \$15,000; of this sum \$2,057.50 is valid. Each bond will be valid to the extent it represents a portion of the debt lawfully contracted. Such a sum is the proportion of the amount of the bond as \$2,057.50 bears to \$15,000; that is $\frac{2,057.50}{15,000}$ of the principle of each bond is valid and collectible. The interest on each bond is determined by the same rule, or calculated upon the amount of each bond held to be valid.

XX. A tax of four per cent was levied for the year 1871, for the purpose of the payment of the principal and interest of the bonds. The law limits the amount of taxes to be levied for such purpose to one per cent. Code, § 1807. The levy to the extent of three per cent is in excess of the authority of the district and must be held void. But for the same reason that we hold the bonds valid to the extent of the amount the district could lawfully become indebted, the levy to the extent of one per cent may be supported in this action. It will be readily seen that different questions would arise in case of an excessive levy enforced by sale of property. We are not to be understood as intimating an opinion that in such a case the levy would be good to the extent of the amount authorized. No such a question arises here. In this case the levy is assailed before it is enforced in the way referred to, and it may now be corrected to harmonize with the law conferring authority upon the district. Of the tax levied one per cent may be collected.

XXI. It appears that a part of the tax has been paid. Whatever sums have been paid in excess of the lawful tax of one per cent which remains in the hands of the county treasurer, or the treasurer of the district, will be refunded to the tax payers, each one receiving the excess paid by him.

XXII. No relief in the nature of a judgment in favor of the bond-holders for the amount lawfully due on the bonds will be granted, as they claim nothing of the kind. An answer in the nature of a cross-bill claiming such relief was filed, but it is insisted by defendant's counsel that it was withdrawn. Whether that be so or not, they are now understood not to claim such relief; we need not inquire whether it may be granted.

A decree in harmony with this opinion will be entered in this court.

Modified and affirmed.

SHEEHY V. COKLEY.

(43 Iowa, 188.)

Slander — justification. Evidence of reputation.

In an action for slander in calling a woman "a whore," proof that she had sexual intercourse with her affianced husband before marriage does not amount to a justification. (*See note, p. 239.*)

In an action for slander in calling a woman "a whore," there was evidence that plaintiff had sexual intercourse with her affianced husband before marriage, and also tending to show that she made an indecent exposure of her person, and otherwise conducted herself in a licentious manner. *Held*, that evidence was admissible to show that plaintiff's general reputation for chastity was good.

ACTION for slander in this, that the defendant, in January, 1872, called the plaintiff "a whore," in the presence of sundry people. Defense, that while plaintiff was unmarried, she had sexual intercourse with Edward Sheehey, her present husband, and others, and that she was delivered of a living child begotten while she was unmarried; that she often conducted herself in a lewd and licentious manner, and made indecent proposals.

The plaintiff replied, denying all the allegations of the answer.

There was a jury trial and a verdict and judgment for plaintiff. Defendant appeals.

Crookham & Gleason, for appellant.

W. S. Kenworthy and *H. G. Curtis*, for appellee.

DAY, J. I. The plaintiff proved the speaking of the words alleged. Upon the part of the defendant it was proved that plaintiff was married on the 28th day of October, 1871, and that she was delivered of a child on the 8th day of April, 1872. It was also proved that she had sexual intercourse with Edward Sheehey on the 18th day of October, 1871. There was also evidence tending to show that plaintiff made an indecent exposure of her person, and otherwise conducted herself in a licentious manner.

Plaintiff in rebuttal testifies that, at the time she had sexual intercourse with Edward Sheehey, they were engaged to be married, which was also the case at the time her child was begotten. The

Sheehey v. Cokley.

plaintiff also introduced about thirty witnesses who testified that before her marriage her reputation for chastity was good, and that her pregnancy was the only thing they ever heard against her chastity.

The court gave twenty-nine instructions, none of which were excepted to at the time they were given. One of the grounds of the motion for a new trial is that the court erred in each instruction given to the jury; but no ground of objection to the instructions given is stated. No question as to these instructions is properly presented for our determination. Code, § 2789. This, however, is immaterial, as the question discussed has been saved by an exception to the refusal to give instructions asked. The principal question presented arises upon the refusal of the court to instruct the jury as follows: "If you find, from the evidence, that the plaintiff, within three years previous to the speaking of the slanderous words, while single and unmarried, did have sexual intercourse with any person, the plea of justification is sustained, and the plaintiff cannot recover. A charge imputing to a female a want of chastity is governed by the same rules of law which govern an accusation, subjecting the accused to criminal punishment; and, if the charge of want of chastity is once sustained, no subsequent conduct on the part of plaintiff will prevent or avoid the penalty of the violated law."

The only act of sexual intercourse proved was committed with Edward Sheehey, to whom plaintiff was betrothed, and whom she shortly afterward married. That this was an act involving a high degree of moral turpitude must be admitted. The instruction asked announces the doctrine that it justified the defendant after her marriage in calling her a whore. This word must be taken in its natural and ordinary acceptation. The common understanding recognizes a well-defined distinction between one who yields to the embraces of her affianced under promise and expectation of marriage, and one to whom the character of whore properly attaches. A whore is a woman who practices unlawful commerce with men, particularly one who does so for hire; a harlot; a concubine; a prostitute. It is true a woman may acquire the character of a whore without being generally accessible to men. She may be the mistress of one and chaste toward all others. But in common parlance a vast difference is recognized between such a person and her who yields only to the solicitations of her affianced. And whilst

such conduct does stain the character, and is a grave offense against morality, still we are very clearly of opinion, that it ought not to furnish a justification for calling the offending party a whore. The case of *Alcorn v. Hooker*, 7 Blackf. 58, announces a contrary doctrine; but the case seems not to have been well considered, and one of three justices comprising the court dissented.

II. The defendant assigns as error the permitting of the plaintiff to prove her good reputation for chastity. We think, though not without some doubt, that this action of the court was correct.

Houghtaling v. Kelderhouse, 2 Barb. 159; S. C., 1 N. Y. 530, was an action of slander, for charging the plaintiff with having killed the defendant's horses by administering poison to them. The defendant gave notice of justification, and proved facts and circumstances tending to show that plaintiff was guilty of having poisoned his horses. The plaintiff, in rebuttal, offered to prove that his general reputation was good, and the court held that this testimony was properly rejected. We have no doubt that the question was properly ruled in that case. The defendant introduced evidence tending to show that the plaintiff was guilty of the specific act with which he was charged, viz.: poisoning defendant's horses. The plaintiff could not parry this evidence, or weaken its effect by proving that his general reputation was good. But the case at bar seems to us to come under a somewhat different principle. The charge against plaintiff, that she is a whore, involves the idea that her offenses against chastity were public and notorious. The charge is sought to be established by proof of moral delinquencies, which, however much they are to be condemned, do not necessarily lead to the conclusion that her character was such as was charged, but from which the jury, perhaps, might infer it to be such. Proof, then, that her general reputation for chastity was good would tend to show that, of whatever indiscretions she had been guilty, her irregularities had not been of such a nature as to impress upon her the character of a whore, and would thus tend to rebut any presumption that she was such, which might otherwise arise from the circumstances proved by defendant. True, the plaintiff may have been a whore, without having established the reputation of being such. And, if she had been proved to be such, proof that her reputation for chastity was good would not be admissible. But when the proof is directed simply to facts, from which the inference that she is a whore may be drawn, but which

Moses v Arnold.

at the same time are not inconsistent with the conclusion that her character is not such, she may, we think, throw into the scale her general reputation for chastity.

The judgment of the court below is affirmed.

Judgment affirmed.

NOTE — See to same effect *Smith v. Wyman*, 4 Shep. 18. A charge of criminal intercourse with A is not justified by showing a criminal intercourse with B. *Walters v. Smoot*, 11 Ired. 815; *Ridley v. Perry*, 4 Shep. 21; and it was thought in *Sharp v. Stephenson*, 12 Ired. 848, that a charge that plaintiff had criminal intercourse with a certain woman at a certain place, cannot be justified by pleading that he had criminal intercourse with a certain woman at a certain other place; and a charge that plaintiff had on a certain night gone to four different colliers' shanties and gone to bed to the colliers, is not justified by showing that she had criminal intercourse with one collier at another place. *Burford v. Wible*, 82 Penn. St. 45. As a rule, a general charge cannot be justified by a single instance. Thus it is no justification of a charge of being a "libelous journalist" to prove plaintiff's conviction for libel on one occasion. *Wakley v. Cooke*, 4 Exch. 511; or of the charge that a lawyer is a pettifogger and without character by proving a single instance of misconduct. *Fitch v. Lemmon*, 28 U. Can. C. B. 278; or of a charge of stealing hogs, by showing the stealing of one hog. *Swan v. Rary*, 8 Blackf. 298; or of a charge of sodomy with a man by proving sodomy with a sow. *Downs v. Hawley*, 112 Mass. : . . . of the charge that plaintiff stole a horse by proving that he stole a hog. *Delland v. Collins*, 26 Gratt. 848; or of a charge of false swearing before the register of the land office by proof of an oath before a notary public relative to the same matter. *Phillips v. Beene*, 16 Ala. 720.

But evidence of facts which come short of a justification may nevertheless be taken into consideration in mitigation of damages. *Chalmers v. Shackell*, 6 C. & P. 475.

See further on this subject Folkard's *Starkie on Slander and Libel* (Wood's ed.), 708, and note 4; Townshend on *Slander and Libel*, § 212.— RMP.

MOSES v. ARNOLD.

(43 Iowa, 187.)

Action — for property wrongfully taken.

Assumpsit will not lie for the value of personal property against one who has wrongfully taken it, provided he still has it in his possession; the action must be tort. (*See note, p. 242.*)

ACTION of attachment.

The defendant moved to discharge the attachment on the ground that the causes of action alleged in the petition are not founded upon contract, and the petition was not presented to, and the attachment allowed by, any judge of the Supreme, District or Circuit Court.

The court overruled the motion, and from the order overruling it the defendants appeal.

Parsons & Lewis, for appellants.

Smith & Wilson, for appellee.

ADAMS, J. The first count in the petition is in the following words: "That on or about the 1st day of April, 1875, the said defendants took and appropriated to their own use one hundred and twenty-five bushels of wheat of the value of \$93.75 of the property of your petitioner, and that no part of the same has been paid for, and that there is now due your petitioner the said sum of \$93.75 for said wheat so taken and appropriated by said defendants."

The petition sets up two other causes of action, both of which are founded upon contract.

It is claimed by the plaintiff and appellee that, notwithstanding the taking of the wheat was a tort, the petition shows that he has waived the tort, and seeks to recover as on an implied contract.

The defendants contend that the tort is not waived. In the consideration of this point, it must be observed in the outset that no contract is averred unless by implication, while the tort is set out unmistakably. As to whether a tort can be waived when the property tortiously taken has not been sold by the wrong-doer, is a question upon which there is a considerable conflict in the decisions.

In *Floyde v. Wiley*, 1 Mo. 643, where the plaintiff's horse came into the possession of the defendant and was converted by him to his own use, it was held that the plaintiff could waive the tort and maintain the assumpsit. The same doctrine is held in Tennessee, and also in an early case in New Hampshire. But in *Mann v. Locke*, 11 N. H. 246, it was held that where personal property had been tortiously taken, the tort could not be waived and assumpsit maintained unless the wrong-doer had sold the property.

Moses v. Arnold.

In *Jones v. Hoar*, 5 Pick. 285, is a full review of the authorities, and PARKER, C. J., said: "The whole extent of the doctrine as gathered from the books seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrong-doer sell the goods and receive the money, waive the tort, affirm the sale and have an action for money had and received for the proceeds."

In *Watson v. Stever*, 25 Mich. 386, a late case, the plaintiff brought assumpsit to recover the value of saw-logs wrongfully taken by the defendant, but not sold by him. The Circuit Court held that the plaintiff could recover. But COOLEY, J., said. "There are not wanting decisions which support the ruling of the circuit judge; but the weight of authority, as well as the tendency of recent decisions, is the other way. If one has taken possession of property and sold or disposed of it, and received money or money's worth therefor, the owner is not compellable to treat him as a wrong-doer, but may affirm the sale as made on his behalf, and demand in this form of action the benefit of this transaction. But we cannot safely say the law will go very much further than this in implying a promise where the circumstances repel all implication of a promise in fact." *Glass Co. v. Wolcott*, 2 Allen, 227; *Stearns v. Dillingham*, 22 Vt. 627; *Smith v. Smith*, 43 N. H. 536; *Willet v. Willet*, 3 Watts, 277; *Pearsoll v. Chapin*, 44 Penn. St. 9; *Fuller v. Duren*, 36 Ala. 73; *Balch v. Patten*, 45 Me. 41.

It appears, then, that proof of a tortious taking of property, where the property has not been sold by the wrong-doer, will not support an averment of a contract, and where the petition negatives the fact of a contract, and there has been no sale of the property, an averment of a contract must be treated as surplusage.

While we think that the petition in this case should have been presented for an allowance, we think the motion was properly overruled. It would have been error to have discharged the attachment altogether, the action being based in part on contract. If more property has been attached than could properly be attached upon that portion of the claim which is based on contract, and if it is practicable to release it without releasing any part of that which may properly be held, the officer on a proper motion may be directed to make such release.

Affirmed.

Moses v. Arnold.

NOTE. — The following is the opinion of the Supreme Court of Michigan in *Watson v. Stever*, cited in the foregoing opinion:

“**COOLEY, J.** Stever, as assignee of one Sheldon, sued Watson in assumpsit to recover the value of logs which Watson had taken possession of, claiming to have bought of third persons. There is no dispute that, if the logs belonged to Sheldon, Watson was liable for their value in trespass or trover; but there had never been any promise on his part to pay Sheldon for them, and, on the contrary, he had always denied his right. If there was any exception to this statement, it was on one occasion when Sheridan's agent demanded certain logs, and Watson said, if the agent could identify any in his possession as belonging to Sheldon, he would pay for them. One was identified and paid for, and the agent said more of them belonged to Sheldon, but as he could not identify them, Watson refused to recognize any further right. It was not shown that Watson had sold any of the logs. The circuit judge charged the jury, that if they found Sheridan owned the logs, and they were used by Watson without Sheridan's consent, Watson was liable for the value in this form of action. And he refused to charge as requested by defendant, that if Watson took and retained the property under a *bona fide* claim of title in himself, the plaintiff could not recover in this action.

There are not wanting decisions which support the rulings of the circuit judge; but the great weight of authority, as well as the tendency of recent decisions, is the other way. If one has taken possession of property, and sold or disposed of it, and received money or money's worth therefor, the owner is not compellable to treat him as a wrong-doer, but may affirm the sale as made on his behalf, and demand in this form of action the benefit of the transaction. But we cannot safely say the law will go very much further than this in implying a promise, where the circumstances repel all implication of a promise in fact. Damages for a trespass are not in general recoverable in assumpsit; and in the case of the taking of personal property, it is generally held essential that a sale by the defendant should be shown. *Jones v. Hoar*, 5 Pick. 285; *Glass Co. v. Wolcott*, 2 Allen, 227; *Stearns v. Dillingham*, 22 Vt. 628; *Mann v. Locke*, 11 N. H. 244; *Smith v. Smith*, 43 id. 536; *Willet v. Willet*, 8 Watts, 277; *Pearson v. Chapin*, 44 Penn. St. 9; *Guthrie v. Wickliffe*, 1 A. K. Marsh. 83; *Fuller v. Duren*, 36 Ala. 73; *Sanders v. Hamilton*, 3 Dana, 552; *Barlow v. Stalworth*, 27 Ga. 517; *Pike v. Bright*, 29 Ala. 332; *Tucker v. Jewett*, 32 Conn. 563; *Emerson v. McNamara*, 41 Me. 565; *Morrison v. Rogers*, 2 Scam. 317; *O'Reer v. Strong*, 13 Ill. 688; *Elliott v. Jackson*, 3 Wis. 649. The case of *Fiquet v. Allison*, 12 Mich. 330, on which reliance was placed by defendant in error, is clearly distinguishable from this. There the parties stood in contract relations as tenants in common in respect to the property in question; and when the defendant appropriated his co-tenant's share, and refused to recognize his right therein, he was, as the court pointed out, guilty of breach of a duty which the law implied from his express contract. This case presents no corresponding feature, and to sustain an action as upon an implied contract here, would be to disregard the primary distinctions in the forms of action.”—**REP.**

Barber v. St. Louis, Kansas City and Northern Railway Company.

BARBER V. ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY
COMPANY.

(43 Iowa, 222.)

Removal of causes to Federal courts.

Section 689 of the United States Revised Statutes, providing for the removal of causes at any time before trial, from State to United States courts, on the ground of prejudice or local influence, is not repealed by the act of Congress of March 8, 1875.

ACTION to recover damages occasioned to the plaintiff through the alleged negligence of the defendants.

The defendant filed a petition for the removal of the cause to the United States Circuit Court on the ground that defendant was a resident of Missouri.

Subsequently, at the same term, defendant filed another petition for the transfer of the cause to the United States court, on the ground of prejudice and local influence existing in the county where the suit was pending. Proper bonds with sufficient security, as provided by the statutes of the United States, were filed with these applications. The court overruled them, and refused to transfer the cause to the United States Circuit Court. From this decision defendant appeals.

Trimble & Carruthers, for appellant. Repeals by implication are not favored. *Casey v. Harned*, 5 Iowa, 1; *Harriman v. The State*, 2 G. Greene, 270; *Burke v. Jeffries et al.*, 20 Iowa, 145; *Baker & Griffin v. S. B. Milwaukee*, 14 id. 214. A subsequent act does not necessarily repeal a former act on the same subject. It is the duty of the court to construe them so as to avoid conflict and inconsistencies. *Robertson v. Young*, 10 Iowa, 291; *Thatcher v. Haun*, 12 id. 303; *Yant v. Brooks*, 19 id. 87. No repeal takes place unless there is an absolute inconsistency. *The State v. Shaw*, 28 Iowa, 67. The court had no jurisdiction over the cause after the application was made. *Herryford v. Etna Ins. Co.*, 42 Mo. 151.

H. B. Hendershott, for appellee. Under the act of 1789, the party was required to make his application for removal of the cause at the time of entering his appearance in the State court. *Gibson*

Barber v. St. Louis, Kansas City and Northern Railway Company.

v. *Johnson*, 1 Pet. C. C. 44; *Ward v. Arredondo*, 1 Paine, 410. It was the intention of the act of March 3, 1875, to consolidate into one statute all the previous enactments on the subject of removals from the State to the Federal courts. *Osgood v. C. D. & V. R. Co.*, 6 Biss. 330.

BECK, J. [After deciding that the first application for removal was insufficient under the act of 1875.] II. The second application of defendant for the transfer of the cause was made to conform to the requirements of the act of Congress of July 27, 1866, as amended by the act of March 2, 1867. These acts, together with that of Sept. 24, 1789, are substantially incorporated into section 639 of the United States Revised Statutes, and, it is presumed, are repealed thereby. § 5596. It is insisted by counsel for plaintiff that section 639 is repealed by the later act of March 3, 1875, and that, as the last application of defendant was in conformity with that section and not with the statute in force, the Circuit Court correctly ruled in refusing to send the cause to the United States court. We are required to determine whether the prior enactments are repealed by the act last mentioned.

The statute, it will be observed, applies to all cases of which the State and Federal courts have concurrent jurisdiction under the Constitution of the United States, as interpreted by the Supreme Court, and provides that either party, in any such case, may remove it to the Circuit Court of the United States for the proper district, § 2. The section next following provides at what *time* such removal may be made, and the proceeding to be had authorizing it. The application is to be at the appearance term, before trial, and may be made at the option of the party without showing cause therefor. This statute confers the right of removal, and prescribes the conditions under which it may be exercised. The right can only be exercised in the manner and at the time provided by the statute.

Under the Revised Statutes (§ 639), in cases of the character of the one before us, namely: those between citizens of the State wherein they are brought, and citizens of other States, the ground of the removal is the showing of prejudice and local influence, whereby justice would be defeated. This statute provides that the right of removal conferred thereby may be exercised at any time before trial, upon a showing of prejudice and local influence.

It will be observed that while the two statutes confer the same

Blanchard v. Lambert.

right, they contain different provisions governing its exercise. In one instance the right is to be exercised at the option of the party, during the appearance term, before trial; in the other, for prejudice or local influence, at any time before trial. The subjects of the statutes are not confined exclusively to the right of removal — the time thereof and the proceedings to authorize the removal are of the subjects of the enactments. The statutes having different subjects in their provisions are not in conflict. The last section of the later act (§ 10), which provides that all conflicting statutes are repealed, does not repeal the provision of section 639, Revised Statutes, providing for the removal of cause on the ground of prejudice and local influence. There is no ground for holding the last act to be repealed by implication.

It follows, from these views, that the Circuit Court erred in refusing to order the removal of the cause, upon the application of defendant, grounded upon prejudice and local influence.

Judgment reversed.

BLANCHARD V. LAMBERT.

(43 Iowa, 238.)

Divorce — when presumed — subsequent marriage.

A husband and wife separated, and afterward the husband lived and cohabited with another woman whom he claimed to be and who was reputed to be his wife. Nine years after the wife, with knowledge of the fact, married again, and lived with the second husband until his death. In a proceeding for dower out of the estate of the second husband, *held*, that it was a presumption of law, (1) that the first marriage had been dissolved by a legal divorce before the second marriage, or (2) if the second marriage was originally void, that a subsequent marriage had taken place after the legal impediment was removed.

PETITION for divorce alleging that the petitioner was the lawful widow of J. D. Blanchard, deceased, and that he died seized of certain lands described.

The defendants, the executors and heirs at law of the said Blanchard, deceased, answered that the petitioner was never legally married to the deceased; that, at the date of said alleged marriage,

she was legally incompetent to contract marriage, being then the lawful wife of one Musgrave, to whom she was married on or about the 24th of May, 1857.

The court find that the petitioner was entitled to dower. Defendant appealed.

A. R. Anderson and Stowe & Hammond, for appellants.

E. H. Sears and Mitchell & Lehman, for appellee.

DAY, J. The evidence shows the following state of facts: The plaintiff's name was formerly Mrs. E. K. Lord. On the 24th day of May, 1857, in Hardin county, Ohio, she married Horatio N. Musgrave, and soon thereafter moved with him to Indiana, and cohabited with him as his wife about one year. They both returned to Ohio about the same time and lived in the same county, but not as man and wife. Some years before plaintiff left Ohio, it was reported that Musgrave was married and he lived with a woman as his wife. Plaintiff lived near by and knew these facts.

In March, 1867, plaintiff, under the name of E. K. Lord, married I. D. Blanchard. She lived with him as his wife until his death, August 14, 1872. She was treated in the community and by her husband with respect, and both she and her husband were of good fame and reputation. Musgrave died in June, 1871.

The action of the court below was clearly right, and should be affirmed upon two grounds.

I. The plaintiff and her former husband, Musgrave, must have separated as early as May, 1858, and there is no evidence that they ever cohabited together as husband and wife after that time. The plaintiff did not marry Blanchard until March, 1867, nearly nine years after her separation from Musgrave. For several years prior to this time Musgrave was living with a woman who claimed to be, whom he claimed to be, and who was reputed to be, his wife. The law presumes that this cohabitation of Musgrave was lawful and not criminal, and that he had obtained a divorce from plaintiff. The case of *Carroll v. Carroll*, 20 Tex. 731, is directly in point. That case involved the legality of the marriage of the defendant, Susan Carroll, with the deceased, Nathaniel Carroll, and arose, as does this, out of the claim of the alleged widow to a share of her husband's estate. It was objected that the marriage was void,

Blanchard v. Lambert.

because the deceased, Nathaniel, at the time of his marriage with Susan, had a wife living, which fact was known to Susan, the defendant. It was proved that Nathaniel had been separated from his former wife about eight years, and that she had married again more than two years prior to the marriage between Susan and Nathaniel. There was no evidence that the first wife of deceased had obtained a divorce prior to her second marriage. But it was held that the law in favor of innocence would raise a presumption that such a divorce had been obtained. That case is, in principle, in all respects like the one at bar. There are other cases which illustrate the force of the presumption of innocence, and show how it overrides opposing presumptions. In the case of *The King v. Inhabitants of Twynning*, 2 B. & Ald. 387, it was held that the law always presumes against the commission of crime, and that a woman who married within twelve months after her husband left the country, would be presumed to be innocent of bigamy, the presumption of innocence preponderating over that of the life of the husband.

In *Yates v. Houston*, 3 Tex. 433 (449), where the husband and former wife separated in 1818, and he cohabited with another woman, as his wife, from 1822 to the time of his death, his former wife not having been heard of during the four years preceding the commencement of the cohabitation, it was held that the ordinary presumption in favor of the continuance of human life should not, under the facts of the case, outweigh the presumption in favor of the innocence of their cohabitation, and that there was no legal impediment to their contracting the matrimonial relation. In *Lockhart v. White*, 18 Tex. 102, the same doctrine was announced. These decisions are in entire harmony with the spirit and policy of the law, and they fully sustain the action of the court below.

II. Musgrave died in June, 1871. The plaintiff and Blanchard after this time continued to live together as husband and wife, until his death in August, 1872. During this time Blanchard introduced the plaintiff as his wife; he called her "ma," when speaking to one of the family; when speaking to strangers he called her "his wife." They lived happily together, and treated each other with mutual respect. During the last illness of deceased, which lasted about ten months, the plaintiff sat up with and waited on him, and in all respects treated him as a lady would her husband. She was treated in the community with respect, and was recog-

nized as the wife of deceased. Blanchard made a will in which he mentions plaintiff as his wife, and bequeaths to her the homestead of 200 acres, and 40 acres of timber contiguous thereto, during her natural life, provided she remains his widow.

Under these circumstances, even if the marriage were originally void, a subsequent marriage will be presumed to have occurred after the removal of all legal impediments by the death of Musgrave in June, 1871. It is a settled rule of the common law that any mutual agreement between the parties to be husband and wife, *in presenti*, followed by cohabitation, constitute a valid and binding marriage, if there is no legal disability on the part of either to contract matrimony. *Rose v. Clark*, 8 Paige's Ch. 574-579. Chapter 102 of the Revision provides the manner of solemnizing marriages in this State. Section 2526 provides that marriage solemnized, with the consent of parties, in any other manner than as prescribed in that chapter are valid; but the parties themselves, and all other persons aiding or abetting, shall forfeit to the school fund the sum of fifty dollars each. So that in this State no express form is necessary, more than at common law, to constitute a valid marriage.

In the case of *Fenton v. Reed*, 4 Johns. 51, it appeared that the party claiming to be the widow of William Reed, deceased, was in the year 1785 the lawful wife of John Guest. In that year Guest left the State for foreign parts, and continued absent until the year 1792, and it was reported and generally believed that he had died in foreign parts. In 1792 the wife of Guest married Reed. In that year, but subsequent to the marriage, Guest returned to the State and continued to reside therein until the year 1800, when he died. Reed and defendant continued to cohabit together and maintained a good reputation in society until 1806, when Reed died. No solemnization of marriage was proved to have taken place subsequently to the death of Guest. Upon these facts it was held the court below was warranted in presuming a marriage after the death of Guest. In *Rose v. Clark*, 8 Paige's Ch. 573, it was held that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation and general reputation, even where the parties originally came together under a void contract of marriage.

In *Jackson v. Claw*, 18 Johns. 347, the same doctrine was announced. See, also, *Starr v. Peck*, 1 Hill, 270.

 McCluer v. Girard Fire and Marine Insurance Company

The case of *Wilkinson v. Payne*, 4 Durn. & East, 468, went still further in the doctrine of presumption. In that case the husband was under age at the time the ceremony was performed; his parents were dead and he had no legal guardian to consent to the marriage; and under the English marriage acts, the marriage was absolutely void. When he became of age his wife was upon her death-bed, and she died in three weeks from that time. But upon proof that the father of the wife, who was the defendant in the suit, and the rest of his family had always treated them as husband and wife, it was left to the jury to presume a legal marriage after the husband was of age, and they did so. The Court of King's Bench refused to disturb their verdict.

In addition to all this, section 1, chapter 151, Laws of 1862, which is an amendment of section 2477 of the Revision, and was in force at the time of the death of Blanchard and of the commencement of this action, provides that continuous cohabitation as husband and wife is presumptive evidence of marriage, for the purpose of giving the right of dower. The judgment of the court below is affirmed.

Judgment affirmed.

 MCCLUER V. GIRARD FIRE AND MARINE INSURANCE COMPANY.

(43 Iowa, 349.)

Fire insurance — description of location of insured property — warranty — “contained in.”

A policy of insurance was issued on a carriage described as “contained in a frame barn.” The carriage was destroyed by fire while at a carriage shop undergoing repairs. *Held*, that the loss was covered by the policy. (*See note, p. 258.*)

ACTION on a policy of fire insurance issued by the defendants upon a phaeton described in the policy as “contained in a frame barn, situated,” etc. The property was destroyed while at a carriage shop undergoing repairs. Judgment was rendered for the plaintiff, and the defendant appealed.

Dewitt C. Cram, for appellant. The risk was restricted to such times as the property insured should be at the place mentioned in the policy. *Annapolis R. Co. v. Baltimore Ins. Co.*, 32 Md. 37;

McCluer v. Girard Fire and Marine Insurance Company.

S. C., 3 Am. Rep. 112; *Ins. Co. v. Throop*, 22 Mich. 146; S. C., 7 Am. Rep. 638; *Liebenstein v. Aetna Ins. Co.*, 45 Ill. 303; *Ellmaker v. Franklin Ins. Co.*, 5 Penn. St. 183. Defendant's liability for the property, when away from the premises named, should be limited to such times as it is being used by the assured in the ordinary course of business. *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400.

Fouke & Lyon, for appellee. The liability of the company was not restricted to the use of the property at the place specified, but extended to the ordinary use of it, when temporarily away from the location mentioned in the policy. *Peterson v. Miss. Valley Ins. Co.*, 24 Iowa, 497; *Mills v. Farmers' Ins. Co.*, 37 id. 400. When there is any doubt in the condition restricting the liability of the company, the construction should be adopted most beneficial to the promisee. *Hoffman v. Ins. Co.*, 32 N. Y. 405. The finding of the court having the same force as the verdict of a jury, it will not be disturbed if there is any evidence to support it. *Savery v. Sypher*, 39 Iowa, 675.

ADAMS, J. It is claimed by the defendant that it is not liable because the phaeton at the time of the loss was not contained in the frame barn, but had been removed to a carriage shop for repairs, and because the risk had been increased.

It is true that any statement or description on the face of the policy which relates to the risk is a warranty. *Wood v. The Hartford Fire Ins. Co.*, 13 Conn. 544. And where goods are described as being in a building occupied in a certain way, the words describing the occupancy must be regarded as employed to express a fact relating to the risk. *Wall v. The East River Mut. Ins. Co.*, 7 N. Y. 370.

Representations in regard to circumstances affecting the risk amount to a stipulation that no change will take place whereby the risk will be increased. *Houghton et al. v. The Manufacturers' Fire Ins. Co.*, 8 Metc. 114.

Where, therefore, as appellant claims, the place in which the insured property is situated is made a part of the description for the purpose of defining the risk, and a removal takes place not contemplated by the policy, the property is no longer covered by the policy. This doctrine is distinctly held in *Boynton v. Clinton and Essex Mut. Ins. Co.*, 16 Barb. 254, and *Annapolis and Elkridge*

McCluer v. Girard Fire and Marine Insurance Company.

R. R. Co. v. Baltimore Fire Ins. Co., 32 Md. 37; S. C., 3 Am. Rep. 112. In the former case goods were insured as "in the store part" of the building, which was on the lower floor, but were at the time of the loss in an office room in the second story. It was held that no recovery could be had. In the latter case the policy was upon certain railroad buildings, including car-houses, and upon cars "contained in car-house No. 1," among which were specified two Murphy and Allison passenger cars. One of them, while in use on the line of the road, was destroyed by fire. It was held that no recovery could be had because at the time of the loss it was not in the car-house.

It is claimed by appellant that these cases are in point, and decisive of the case at bar. It may be conceded that the situation of the property is mentioned in the policy as a fact affecting the risk. The words describing the situation must then be regarded as a warranty not only that the property was contained in the barn, but would continue so; and if, at the time of the loss, the carriage was not contained in the barn within the meaning of the policy, we do not see how the plaintiff can recover. This leads us to consider what is meant by the words "contained in a barn," when used in a policy of insurance and applied to a carriage. Suppose at the time the policy was signed and delivered the carriage was standing in the street in front of the defendant's insurance office, where possibly it was; would it be competent now to show such fact to defeat the policy? We think not. The words "contained in a barn" were not used to describe its situation at that moment. That was not the material fact in regard to which the company desired a stipulation. The material fact was that the carriage when not in use was kept in the barn, described as its ordinary place of deposit.

If the plaintiff signed an application, and was asked where he kept the carriage, his answer was, if he made a true one, that he kept it in the barn described, notwithstanding it might at that moment have been in use and not in the barn.

In one sense it would not have been true that he at that moment kept it in the barn, but it would have been true within the meaning of the inquiry. If the word *kept* had been used in the policy instead of the word *contained*, we think the meaning would have been the same.

The words which are used must be construed with reference to

McCluer v. Girard Fire and Marine Insurance Company.

the property to which they are applied. Carriages which are kept for sale and are insured as contained in a certain warehouse could not be removed to a different warehouse without avoiding the policy. There is nothing in the nature of the property to indicate that they will be removed, and the insurance is not made with reference to such fact. But where a person procures a policy upon his horse, harness, buggy and phaeton, as contained in a certain barn, the presumption must be that they are in use, and that the policy is issued with reference to such use. This doctrine was held substantially not only by this court in *Peterson v. Miss. Valley Ins. Co.*, 24 Iowa, 494, but in Massachusetts in *Fitchburg R. R. Co. v. Charlestown Mut. Fire Ins. Co.*, 7 Gray, 64.

It is claimed, however, that the case of *Annapolis and Elkridge R. R. Co. v. Baltimore Fire Ins. Co.*, above cited, holds a different doctrine. In that case a car was insured as in a car-house and was when destroyed out on the road, and a right to recover was denied.

The decision in this case was put upon a peculiar ground. *It appeared that the car-house could not contain all the cars described in the policy.* Again, the policy was upon the car-house as well as the cars, and the car-house being in a city, it and the cars in it were more exposed than cars on the road. It was thought, therefore, considering the fact of the greater danger, and also the fact that the car-house would not hold all the cars mentioned in the policy, that the intention of the railroad company was to insure the car-house and its contents *as contents*. GRASON, J., said: "While some of the cars which were insured were in use, others were not; but each car in its turn took its place in the car-house, and while actually contained therein was covered by the policy, so that by the terms of the contract the appellee (the insurance company) would have been liable for all damages by fire to any of the insured cars which might have occurred while they were actually in the car-house."

In the case at bar there is nothing to indicate that it was the intention to insure the contents of the barn as such. Each policy must be construed according to the intention of the parties as manifested by all its terms. We are of the opinion, therefore, that while the words "contained in a barn," describing it, are words relating to the risk, and constitute a warranty that the carriage would continue to be contained in the barn, they mean only that the barn described was their place of deposit when not absent there-

McCluer v. Girard Fire and Marine Insurance Company.

from for temporary purposes incident to the ordinary uses and enjoyment of the property.

The appellant sets up as an additional ground of defense that the risk was increased by the removal of the carriage to the carriage shop. We might indeed concede that the carriage shop was not as safe a place as the barn, although the evidence upon this point does not clearly show whether it was or not.

In *Billings v. Tolland Ins. Co.*, 20 Conn. 139, the risk was increased by the introduction into the building of an oil barrel and some mixed paints. It was held that a single act which did not belong to the ordinary use of the building would not prevent a recovery. The same doctrine was held in *Shaw v. Robberds*, 6 Ad. & El. 75, and *Leggett v. Aetna Ins. Co.*, 10 Rich. 202.

In *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168, it was held that any increase of risk, incident to the making of reasonable and necessary repairs, is a part of the general risk assumed by the insurers and will not avoid the policy. Where a carriage is to be repaired its removal to a carriage shop is incident to the repairs, and if the carriage is allowed to remain there only a reasonable length of time, we think the risk such only as was contemplated by the insurer and paid for by the insured.

Judgment affirmed.

NOTE.—It is a reasonable rule, though one not universally followed, that the court must look at the nature of the property insured as well as the words of the contract to ascertain the intention of the parties. *Fitchburg Railroad Co. v. Charlestown Insurance Co.*, 7 Gray, 64.

An insurance on a house includes every thing accessory or appurtenant to the main building as a rear building separated by a small yard and used as a kitchen. *Workman v. Insurance Co.*, 2 La. (O. S.) 507; and see *White v. Insurance Co.*, 8 Gray, 566; *Blake v. Insurance Co.*, 12 id. 265. So a policy on "stock contained in a chair factory," was held to cover stock, not only in the main building but also in the engine-house appurtenant to but ten feet distant from the main building. *Liebenstein v. Baltic Insurance Co.*, 45 Ill. 301. So a policy "on machinery, consisting of cards, mules, pickers, shafting and belting . . . in the first story of a four story and basement building, situate," etc., was held to cover pickers which were not in the first story of the building when the policy was issued, nor when they were burned, but were in the "picker house," a one story extension. *Meadowcroft v. Standard Insurance Co.*, 61 Penn. St. 91. So a policy on cars, etc., "on the line of their road, and in actual use, covers cars on a branch road 440 feet from the line of the plaintiff's road." *Fitchburg Railroad Co. v. Charlestown Insurance Co.*, ante.

In *Fair v. Manhattan Insurance Co.*, 112 Mass. 320, the policy was "on stock of dry goods . . . contained in the frame building known as Hunt Building, . . . as per plan filed." The goods insured were at the time in one store in said Hunt Building, which the plan filed showed to be divided into

McCluer v. Girard Fire and Marine Insurance Company.

several stores. At the time of the loss the goods were distributed through all the stores. Held, that the words of the policy did not restrict the insured to a particular part of the building, and that the policy covered the loss.

In *Farmers' Loan and Trust Co. v. Harmony Fire Insurance Co.*, 51 Barb. 33; affirmed, 41 N. Y. 619, the plaintiffs as trustees effected an insurance "on any property belonging to the said trust company as trustees and lessees as aforesaid and on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on premises owned or occupied by the said trustees, and situate on their railroad premises in the city of Racine." The plaintiffs as such trustees owned and occupied a wharf to which the cars came, and which was used in transferring freight between boats and cars. Plaintiffs' dredge boat was burned while fast to this wharf, and the court held that the loss was within the meaning of the policy. In *Webb v. National Insurance Co.*, 2 Sandf. 497, the policy was on timber in a ship yard, and the court admitted evidence that it was usual to keep such timber on the sidewalk, outside of, but in the vicinity of the shipyard, and held that, such usage being proved, the policy covered timber on the sidewalk. So, when a policy covered "furniture" generally in a house which was described, furniture stored in a garret and but rarely used was held to be included. *Clark v. Firemen's Insurance Co.*, 18 La. (O. S.) 431.

In *Peterson v. Mississippi Valley Insurance Co.*, 24 Iowa, 494, a policy was issued on plaintiffs "dwelling-house, \$400; grain in the stack or crib, \$600; hay in stack, \$820; seven horses, \$750; cattle, \$375, situate in section 22, town 99, range 7 west." While the insured was hauling his grain to market he stopped for the night at a hotel, the barn of which with one of his horses was burned. Held, that the contract did not limit the use of the property to section 22; but that the language used was intended to describe the location and not to limit the use of the horses to the land mentioned. So in *Mills v. Farmers' Insurance Co.*, 87 Iowa, 400, the issuers of a policy on live-stock were held liable for a horse killed at a place not upon the premises specified, if it was being used in the ordinary course of business.

In *Everett v. Continental Ins. Co.*, 21 Minn. 76, the policy was on a threshing machine "stored in barn," etc. The machine was not in the barn when destroyed, but in a field where it had been in use. The policy provided that only such false or erroneous representations as were *material* should avoid it. The court held that the representation as to location was not material, but that its object was simply to identify the machine. The court continued: "but whatever might have been the purpose of the location of the machine in the application and policy, there is no ground whatever for contending that it was, in letter or spirit, a promissory stipulation on the part of the insured or a condition of insurance on the part of the insurer, that this location should remain unchanged, or if changed, that while changed, the insurance should cease or be suspended." Citing *Smith v. Mech. & Travelers' Ins. Co.*, 82 N. Y. 399; *Blood v. Howard Fire Ins. Co.*, 12 Cush. 472; *Flanders on Fire Ins.* 241, 255, 269, 455.

On the other hand, in *Eddy Street Foundry v. Camden Ins. Co.*, 1 Cliff. 300, the property to be insured was described as being in a building in the rear of 82 Eddy street, used as a furnace house. The property was destroyed in a storehouse which could not properly be described as being in the rear of 82 Eddy street but as in the rear of 82 and 84 of that street. It was held that the insured could not recover because the property was not at the place described. So where goods were described as "in the store part" of a building, but when lost they were

Horst v. Wagner.

in the second and third stories of the building, whilst the store part was occupied by other parties; it was held that the insurers were not liable. *Boynton v. Clinton Ins. Co.*, 16 Barb. 254.

A policy on a "new bark now being built at Butler's shipyard at Baltimore," was held not to cover material and other work prepared to be put on the bark and lying in the ship yard and in sail lofts therein. *Mason v. Franklin Ins. Co.*, 12 Gill & J. 468. A policy "on chair lumber contained in the two story frame building," etc., was held not to include chairlumber in the engine-house, though connected by a platform with the building. *Liebenstein v. Aetna Ins. Co.*, 45 Ill. 303.

In *Providence, etc., R. R. Co. v. Yonkers Ins. Co.*, 10 R. I. 74, the plaintiffs, the P. & W. R. R. Co., procured insurance in the defendant insurance company, the policy of insurance containing the following proviso: "Provided, all the property hereby insured is on premises owned or occupied by the Providence & Worcester Railroad Co., in Massachusetts and Rhode Island. * * * It matters not whether the property is in motion on the road, at rest, or in buildings." Held, that by reason of this proviso the defendant insurance company was not liable for a loss occurring upon premises not used or occupied by the plaintiffs at the time of the issuing of the policy, although so used and occupied by them at the time of the loss.

In *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; S. C., 14 Am. Rep. 249, the policy was on merchandise "contained in letter C, Patterson stores." The "Patterson stores" constituted a warehouse divided into sections by fire-proof walls, and were designated by letters of the alphabet. The merchandise was in fact in "letter A" at the date of the policy and of the loss. In an action to reform the policy on the ground of mistake and to recover the loss, it was held that the description of the locality of the insured goods was a warranty, and that the defendants were not liable.—RMP.

HORST V. WAGNER.

(43 Iowa, 373.)

Negotiable instrument — alteration of — when not material — innocent alteration

The payee of a note, desiring to transfer it, and being ignorant of the appropriate method, erased his own name and inserted that of the transferee; but subsequently and before delivery restored the instrument to its original form and transferred it by indorsement. Held, that the alteration was not material.*

ACTION on a promissory note executed by the defendant, Wagner, to the plaintiff's father, John Horst, payable to his order, and on a mortgage given to secure the same.

* See *Draper v. Wood* (112 Mass. 315), 17 Am. Rep. 92 and note.

The said John Horst, in order to transfer the note to his daughter, the plaintiff, erased the name *John* and inserted the name *Frances*. Afterward, and so far as the record shows, before the note was delivered to the plaintiff, he struck out the alteration, restored the note to its original form, and transferred the note to the plaintiff by indorsement.

The defendant, Wagner, sets up, as a defense, the alteration. Judgment for defendant. Plaintiff appeals.

H. & W. Scofield, for appellant. The alteration of the note, under the circumstances of the case, was immaterial. 2 Pars. on Cont. 226; *Cooley v. Brayton*, 16 Iowa, 16; *Robinson v. Phoenix Insurance Co.*, 25 id. 434. Nothing but a fraudulent purpose or corrupt intent in making the alteration would render the note void. *Trow v. Starch Co.*, 1 Daly, 280; *Van Horn v. Bell*, 11 Iowa, 468; *Murray v. Graham*, 29 id. 524; *Krause v. Meyer*, 32 id. 567. The mortgage, standing alone, is an evidence of indebtedness, upon which the plaintiff may recover. *Gillett v. Powell*, Spear's Ch. 142; *Clark v. Bancroft*, 13 Iowa, 322; *Newbury v. Rutter*, 38 id. 181.

McJunkin, Henderson & Jones, for appellee.

ADAMS, J. I. We are inclined to think the alteration of the note was material. The plaintiff, as the note stood altered, could not properly demand payment. She was neither indorsee nor rightfully payee. That a material alteration of an instrument by the holder, without mistake, and with intent to change the legal effect, will discharge the maker, is, of course, not denied. But in this case three things should be observed :

1st. The payee, John Horst, testifies : "I made the alteration to assign the note to my daughter." No reason is shown for his not indorsing it, except ignorance and mistake. It is claimed by appellee, to be sure, that as the note was given for land which plaintiff's father had intended to deed her, and that as she was a minor when it was sold to defendant, an attempt was made to transfer the note by alteration instead of by indorsement, to enable her to set aside the sale. It is sufficient for us to say that we do not think the evidence sustains this theory. We are satisfied that the alteration was made wholly through ignorance and mistake, as to the proper manner of transferring the note.

State v. Winthrop.

2d. There was no intent to change the legal effect of the instrument otherwise than to substitute the plaintiff as payee, and no intent to prejudice the maker in any respect.

3d. The alteration was stricken out, the note was restored to its original form, and regularly indorsed to the plaintiff.

Such being the facts, we are of the opinion that the plaintiff was entitled to recover.

In 2 Pars. on Notes and Bills, 570, the author says: "If the alteration was made fraudulently, or with illegal intention, or if the original words cannot certainly be restored, or if any party has become interested in the note, or affected by it, or related to it, since the alteration, in such a way that the alteration will do a wrong to that party, in either of these cases we should say that the party must abide by the alteration he made, and accept the consequence of making it. But unless one of these reasons exists, we are not aware of any good and sufficient argument for refusing to permit him to restore the instrument to its original form and force."

It is not necessary that we should indorse the doctrine of the learned author to the full extent. The payee was authorized by the very terms of the note to make it payable to plaintiff. He was authorized to accomplish the very result which he attempted to accomplish. The objection, therefore, is not as to the result aimed at, but to the manner of effecting it. Had the result aimed at not been authorized, it would be more doubtful whether the alteration could be stricken out and the instrument restored. But as the alteration in this case was simply an unauthorized manner of accomplishing an authorized result, we cannot regard it such an alteration as may not properly be stricken out, so as to leave the instrument in its original form.

Judgment reversed.

STATE V. WINTHROP.

(43 Iowa, 519.)

Criminal law — murder — when infant subject of — independent life.

An infant, even after birth, is not the subject of murder, until an independent circulation has been established.

INDICTMENT for murder. Conviction and sentence for manslaughter.

J. Evans Owens, for appellant.

M. E. Cutts, attorney-general, for appellee.

ADAMS, J. The defendant is a physician, and was employed by one Roxia Clayton to attend her in childbirth. The child died. The defendant is charged with having produced its death. Evidence was introduced by the State tending to show that the child, previous to its death, respired and had an independent circulation. Evidence was introduced by the defendant tending to disprove such facts.

The defendant asked the court to give the following instruction:

“To constitute a human being, in the view of the law, the child mentioned in the indictment must have been fully born, and born alive, having an independent circulation and existence separate from the mother, but it is immaterial whether the umbilical cord which connects it with its mother be severed or not.”

The court refused to give this instruction, and gave the following.

“If the child is fully delivered from the body of the mother, while the after birth is not, and the two are connected by the umbilical cord, and the child has independent life, *no matter whether it has breathed or not, or an independent circulation has been established or not*, it is a human being, on which the crime of murder may be perpetrated.”

The giving of this instruction, and the refusal to instruct as asked, are assigned as error.

The court below seems to have assumed that a child may have independent life, without respiration and independent circulation. The idea of the court seems to have been that the life which the child lives between the time of its birth and the time of the establishment of respiration and independent circulation is an independent life. Yet the position taken by the attorney-general, in his argument in behalf of the State, is fundamentally different. He says: “It will probably not be contended that independent life can exist without independent circulation, and hence the existence of the former necessarily presumes the existence of the latter, and so

other or further proof is unnecessary." He further says: "The instruction complained of amounts to nothing more than the statement that, if the child had an independent life, then it was not necessary to establish those facts upon which the existence of life necessarily depends." If such was the meaning of the court below, the language used to express it was very unfortunate. The court said that, if the child had independent life, it is no matter whether an independent circulation had been established or not. The attorney-general says that, if the child had independent life, it had independent circulation, of course. But whether we take the one view or the other, we think the instruction was wrong. We will consider first the view that independent life and independent circulation necessarily co-exist, and examine the instruction as if that were conceded.

It follows that where a child is born alive, and the umbilical cord is not severed, and independent circulation has not been established, independent life is impossible, and the instruction amounts to this, that if the jury should find independent life under such circumstances, although it would be impossible, they might find the killing of the child to be murder. Such an instruction could serve no valuable purpose, and would necessarily involve the jury in confusion. It would do worse than that; it would tell the jury in effect that they might find independence of life in utter disregard of the conditions in which alone it could exist. To show how the defendant was prejudiced, if the instruction is to be viewed in this light, we may say that there was evidence that the *ductus arteriosus* was not closed. This evidence tended to show, slightly at least, that independent circulation had not been established. The instruction told the jury, by implication, that they might disregard this evidence. But we feel compelled to say that we do not think that the attorney-general's interpretation of the instruction ever occurred to the court below. It is plain to see that the court below meant that independent life is not conditioned upon independent circulation. The error, if there was one, consisted in assuming that it was not. The question presented for our determination is by no means free from difficulty. Can the child have an independent life, while its circulation is still dependent upon the mother? There are two senses in which the word "independence" may be used. There is actual independence, and there is potential independence. A child is actually independent of its father when it is earning its own

living. It is potentially independent when it is capable of earning its own living. We think the court below used the word *independent* in the latter sense. While the blood of the child circulates through the *placenta*, it is renovated through the lungs of the mother. In such sense it breathes through the lungs of the mother. Wharton & Stille's Medical Jurisprudence, 2d Vol., § 128. It has no occasion during that period to breathe through its own lungs. But when the resource of its mother's lungs is denied it, then arises the exigency of establishing independent respiration and independent circulation. Children, it seems, oftentimes do not breathe immediately upon being born, but if the umbilical cord is severed, they must then breathe or die. Cases are recorded, it is true, where a child has been wholly severed from the mother, and respiration has not apparently been established until after the lapse of several minutes of time. During that time it must have had circulation, and the circulation was independent. Whether it had inappreciable respiration, or was in the condition of a person holding his breath, is a question not necessary to be considered for the determination of this case. It is sufficient to say, that while the circulation of the child is still dependent, its connection with the mother may be suddenly severed by artificial means, and the child not necessarily die. This is proven by what is called the Cæsarean operation. A live child is cut out of a dead mother and survives. Such a child has a potential independence antecedent to its actual independence. So a child which has been born, but has not breathed, and is connected with the mother by the umbilical cord, may have the power to establish a new life upon its own resources antecedent to its exercise. According to the opinion of the court below, the killing of the child at that time may be murder. It is true that after a child is born it can no longer be called a *fœtus*, according to the ordinary meaning of that word. Beck says, however, in his Medical Juris., 1st Vol., 498: "It must be evident that when a child is born alive, but has not yet respired, its condition is precisely like that of the *fœtus in utero*. It lives merely because the *fœtal* circulation is still going on. In this case none of the organs undergo any change." Casper says, in his Forensic Medicine, 3d Vol., 33: "In *foro* the term 'life' must be regarded as perfectly synonymous with 'respiration.' Life means respiration. Not to have breathed is not to have lived."

While, as we have seen, life has been maintained independent of

Logan v. Pyne.

the mother without appreciable respiration, the quotations above made indicate how radical the difference is regarded between *fatal* life and the new life which succeeds upon the establishment of respiration and independent circulation.

If we turn from the treatises on Medical Jurisprudence to the reported decisions, we find this difference, which is so emphasized in the former, made in the latter the practical test for determining when a child becomes a human being in such a sense as to become the subject of homicide. In *Rex v. Enoch*, 5 C. & P. 539, Mr. Justice J. PARKE said: "The child might have breathed before it was born, but its having breathed is not sufficiently life to make the killing of the child murder. There must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose."

In *Regina v. Trilloe*, 1 Car. & M. 650, ERSKINE, J., in charging the jury, said: "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner willfully and of malice aforethought strangled the child, after it had been so produced, and while it was alive, and while it had an independent circulation of its own, I am of the opinion that the charge is made out against the prisoner." See, also, Greenleaf on Ev., 3d Vol., § 136.

It may be asked why, if there is a possibility of independent life, the killing of such a child might not be murder.

The answer is, that there is no way of proving that such possibility existed if actual independence was never established. Any verdict based upon such finding would be the result of conjecture.

Judgment reversed.

LOGAN V. PYNE.

(43 Iowa, 524.)

Municipal corporation — powers — right to grant monopolies.

A city was authorized by its charter to "license, tax and regulate" omnibuses. *Held*, that it had no power to grant an exclusive right to run omnibuses within its limits.*

* See 1 Dill. Mun. Corp., § 291, et seq.

ACTION for damages. The plaintiff's petition alleged that by ordinance the city of Dubuque had granted to plaintiff the exclusive privilege and franchise of running, for hire, omnibuses for the purposes of conveying passengers, etc., in said city; that the defendant, in violation of said ordinance, did, during the continuance thereof, run omnibuses for the conveyance of passengers in said city to plaintiff's damage.

To the petition defendant demurred on the ground that the grant of exclusive privilege, attempted to be made in the ordinance, is beyond the authority of the city, and, therefore, void. The demurrer was overruled, and, the defendant standing thereon, judgment was rendered against him, from which he appeals.

The provisions of the charter of the city, so far as bearing upon this question, are stated in the opinion.

E. McConey, for appellant.

D. E. Lyon and Wilson & O'Donnell, for appellee.

BECK, J. I. The power of municipal corporations is strictly confined within the limits prescribed by the statutes creating them, and will not be extended by the courts upon mere inference. It always depends upon express grant, or must be necessarily implied as incident to other powers expressly granted, or indispensable to the object and purpose for which the corporations were created. Doubts as to the existence of such powers must be resolved against the corporations and in favor of the public. *Merriam v. Moody, Ex'r*, 25 Iowa, 164; *The State v. Smith*, 31 id. 493; *Ham v. Miller*, 20 id. 450; *City of Burlington v. Keller*, 18 id. 60.

II. A municipal corporation can grant, if at all, exclusive privileges for the protection of business which, without prohibitory legislation, would be free to all men, only under express legislative grant of power. Monopolies being prejudicial to the public welfare, the courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy. *The State ex rel. v. Cin. Gas-light and Coke Co.*, 18 Ohio St. 262; *Minturn v. Larue*, 23 How. 435; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

III. The power in question attempted to be exercised by the city, in granting plaintiffs the exclusive right to run vehicles for the transportation of passengers, it is claimed by plaintiffs, may be

Logan v. Pyne.

based upon certain provisions of the city charter to the following effect. The charter declares that the city shall "exercise and enjoy all rights, immunities, powers and privileges" * * * "appertaining to a municipal corporation," and may "make all ordinances necessary and proper for carrying into effect the powers" granted by the charter; and that it may "make regulations to secure the general health of the city," and may "license, tax and regulate hackney carriages, omnibuses, wagons, carts, drays and all other vehicles." These are all of the provisions found in the charter which are relied upon to support the power of the city, to enact and enforce the ordinance in question. It certainly cannot be claimed that, in any one of them, is the power conferred by express words.

As we have seen, the power to grant monopolies does not appertain to a municipal corporation, unless upon express grant. It cannot be claimed that a general grant of such powers as pertain to cities would include such as can only be exercised under an express grant. Such a rule would abrogate the doctrine restricting the city to the exercise of such powers as are expressly conferred upon it and carries on its face an obvious construction of terms. The provisions of the charter authorizing ordinances necessary to carry into effect the powers granted, and to secure the general health of the city, cannot be interpreted as an additional grant of power, but must be understood simply as direction for the exercise of powers before bestowed. The grant of power to license, tax and regulate omnibuses and other vehicles, certainly cannot be construed into the bestowal of authority to create monopolies in their use. It has been held that, when a municipal charter granted the power to regulate and license the slaughtering of animals, the city council could not designate a particular building for the prosecution of such business and forbid it elsewhere, thus conferring upon the owner a monopoly of that business in the city. *Chicago v. Rumpff*, 45 Ill. 90.

We conclude that the charter of the city of Dubuque confers no authority upon the municipal government to grant the exclusive privilege of running omnibuses and other vehicles, as is attempted in the ordinance under which the plaintiffs claim to recover in this case. The demurrer to this petition ought, therefore, to have been sustained.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

STATE V. McLAUGHLIN.

(15 Kan. 228.)

Tuition — to pay void municipal bonds — right of State to maintain action to restrain collection of.

An action does not lie in the name of the State at the relation of the attorney-general for an injunction to restrain the collection of a tax levied to pay void bonds issued by a public (school district) corporation.

SUIT in the name of the State on the relation of the attorney-general against McLaughlin, county treasurer, to restrain the collection of certain taxes.

W. D. Webb, for plaintiff.

W. W. Guthrie, for defendants.

BREWER, J. This was an action brought by the State, upon the relation of the attorney-general, to restrain the county treasurer of Brown county from further proceedings to collect certain taxes, and the principal question presented is as to the right of the plaintiff to maintain the action. The facts alleged are, that a school district some years since made an arrangement with a church society by

State v. McLaughlin.

which, upon condition that the latter advanced a thousand dollars, the former should, in building the public school-house, make arrangements for a room for the church services of the latter; that this arrangement was carried into effect, and to secure this advancement two bonds of the district were executed, delivered to the church, and still remain in its possession; that the bonds maturing, a levy was duly made to pay them off, and that proceedings had advanced so far, that the defendant, the county treasurer, had possession of the tax roll, and was proceeding to collect, with other taxes, the tax for this purpose. The church and the county treasurer are the only parties made defendants. It is nowhere alleged that any tax payer in the district questioned the legality of the tax, or had any objection to paying his proportion of the amount necessary to redeem these bonds. Nor does it appear that there was any want of good faith on the part of the district, or the church, or that the contract was not satisfactory to both parties, and fully and fairly executed by both. The case is rested upon the naked proposition, that the contract, being *ultra vires* of the district, the bonds are void, and that the tax payers of the district, whether willing or not, must not be allowed to pay them. The district judge decided that the action would not lie in the name of the State, on the relation of the attorney-general. The plaintiff brought this ruling here on error. Since it has been pending in this court the officers of the district have filed a written request and order that the case be dismissed. It is obvious that this interference on the part of the State is unnecessary for the protection of any rights. It is not a case where, but for the intervention of the State, an irremediable wrong will be perpetrated. Conceding the bonds to be void, each and every tax payer has ample protection by an action of injunction. Nor is a multiplicity of suits necessary. The tax, as a tax, being illegal, all the tax payers may unite in a single action. *Hudson v. Comm'rs of Atchison County*, 12 Kan. 140. It is apparent, too, that no action of the corporation, the school district, is sought to be prevented. It is not even a party to the suit. So far as the bonds are concerned, the school district issued them long ago. So far as any levy of taxes is concerned, that has already been done. All that now remains is the action of the ministerial officer, the treasurer, in collecting the taxes and the subsequent payment of the bonds. It is clear, too, that there is no express warrant in the Constitution or the statutes for such an action on the part of the attorney-gen-

eral. The Constitution is silent as to the powers and duties of that officer. Const., art. 1, §§ 1 and 14. The statute defining his duties grants no such power, imposes no such duty. Gen. Stat., pp. 986, 987. If such power exists it must be by virtue of the general power of the State to supervise and control the action of all corporations and officers, and the fact that the attorney-general is the general law officer of the State. While in a certain sense it may be true that the State has a supervision and control over all its corporations and officers, yet to conclude therefrom that it is either the duty or the privilege of the attorney-general to interfere in the case of every illegal act of a corporation, or officer, would be a deduction both novel and startling. Actions of *quo warranto* may be brought by the attorney-general against both officers and corporations for ouster and forfeiture. Laws of 1871, p. 276, §§ 1, 2. In the fourth clause of this first section it is expressly provided, that the action may be brought "when any corporation abuses its power, or exercises powers not conferred by law." It may not, however, follow from this that *quo warranto* is the only remedy. It cannot be maintained by one who has no other interest than as a citizen and tax payer. *Miller v. Town of Palermo*, 12 Kan. 14. If the wrong is of a public nature, affecting the community in general, the State through its proper officers can alone maintain the action. Mandamus will lie at the instance of the attorney-general when the duty sought to be compelled is one of a purely public nature. *Bobbett v. Dresher*, 10 Kan. 9. It will not, under the same circumstances, lie at the instance of a mere citizen and tax payer. So, too, we think the process of injunction may be invoked by the State in any proper case. Indeed, we know of no reason why the State may not avail itself of any of the writs and processes of the law available to individuals for the enforcement of rights, and the redress of wrongs. So that the form of the action is no objection, if the right exists in the State to interfere. It is obvious that the State as a State has no direct interest in this controversy, any more than in a controversy between individuals. The payment of these bonds may be illegal, but their payment works no greater wrong to the State than the payment by a single individual of an illegal debt. The single individual may, if he chooses, by appealing to the ordinary proceedings of the law, protect himself against such illegal payment. So may the many tax payers. The case of *The State v. County Court*, 51 Mo. 350 ; S. C., 11 Am. Rep.

State v. McLaughlin.

454, is cited as authority. There, by a divided court, the right of the State was sustained to interfere by injunction to restrain the County Court from issuing bonds in pursuance of an illegal subscription, and the officers and collector from levying, assessing and collecting taxes to pay interest or principal of some of the bonds already issued. In reference to the levy it appeared that the county court had included the tax in the general county taxes, so that it could not be separated, and the tax payer could not tell what part was legal and what illegal. The general doctrine was laid down, that "it is competent for the State, at common law, through its officers to maintain proceedings by injunction, to restrain public corporations from doing acts in violation of the Constitution and laws of the State." It would seem from the opinion of the court, given by SHERLEY, special judge, that the action would not have been sustained if the bonds had already been issued, the tax levied, and so levied that the tax payers by a single action could have protected themselves. Two cases are referred to in the opinion as containing full discussions of the principles involved, one that of *Davis v. The Mayor of New York*, 2 Duer, 663, in which Judge DUER reached the conclusion that in an action "brought by two tax payers against the mayor and others to restrain the construction of a street and railroad upon Broadway, for the doing and operating of which the municipal authorities of the city had given authority," the attorney-general was a necessary party; and the other, that of the *Attorney-General v. Minur*, 2 Lans. 396, in which Judge MULLEN concludes that the only cases in which "the attorney-general was authorized to interfere to restrain corporate action, or was a necessary party to an action for that purpose, where those in which the act complained of would produce a public nuisance, or tend to the breach of a trust for charitable uses. We have referred to these three cases, not as covering the exact question before us, but as containing full discussions of the general question of the right of the State to interfere by injunction to restrain apprehended wrong on the part of public corporations and officers. For in this case, as already noticed, corporate action has ceased, and the interference of the State is sought to restrain a ministerial officer, and that not an officer of the corporation, from discharging the ordinary duties of his office, although those duties are based partially upon the prior illegal corporate action, when the individuals affected thereby have complete and adequate remedy without multiplicity of

Spencer v. Joint School District.

suits and by a single action. No authority to which we have been referred has gone so far as to sustain such an action; and we think the same cannot be maintained. As private citizens, unless specially authorized, may not interfere to compel the performance of a mere public duty, or restrain the doing of a mere public wrong, so the State, having no direct interest, may not interfere to protect individuals from the illegal acts of a public officer where such individuals have in the ordinary course of the law, ample and adequate means of protection.

The judgment of the District Court will be affirmed.

KINGMAN, C. J., concurring.

VALENTINE, J. I concur, with some doubts, in the decision of this case. For, while under the circumstances of this case eminent justice has been done by the decision, yet at first view I thought there might be cases where such a decision might allow manifest injustice to be done. Thousands of bonds for various purposes have been issued in different portions of this State, within the last six or eight years, illegally, fraudulently, flagrantly, perfidiously, and in many cases where all the local officers, who would have the power to commence an action to have such bonds declared void, are interested in having them held valid, and where the individual tax payers of the locality have no adequate remedy. But after a careful consideration of the question, I have come to the conclusion that the decision in this case will not prevent the attorney-general from prosecuting an action in the name of the State to prevent a public injustice that could not otherwise be avoided.

Judgment affirmed.

SPENCER V. JOINT SCHOOL DISTRICT

(15 Kan. 260.)

Public school-house — unlawful use of — injunction to restrain — party.

The use of a public school-house for other than school purposes is unlawful and may be enjoined at the suit of any one injured thereby.

The petition for an injunction to restrain the use of a public school-house for other than school purposes, alleged that the plaintiff was "a resident of the school district and a tax payer therein, that his children attended school in

Spencer v. Joint School District.

the said school-house, and that by the improper use of the building complained of, the books of his children were torn, soiled, carried away, lost and misplaced," etc. *Held*, that plaintiff showed such a personal and private injury and interest as would enable him to maintain the action.

PETITION for an injunction against Joint School District No. 6 of Nemaha and Brown counties, to restrain the use of the public district school-house for other than school purposes. The defendant demurred for that the petition did not state facts sufficient to constitute a cause of action. The District Court sustained the demurrer and dismissed the petition.

Johnson & Fulloon, for plaintiff.

N. Price and J. E. Taylor, for defendant.

BREWER, J. This was an action brought to restrain the defendant from leasing its school-building for other than school purposes. Two questions are raised. First, does the plaintiff show such a peculiar and personal interest as will enable him to maintain the action? and, second, do the facts alleged disclose grounds for the relief sought? The plaintiff alleges that "he is a resident of the school-district, and tax payer therein, and as such tax payer has contributed his proportion of taxes for the building of the said school-house; that his children attend school therein, and that by the improper uses of the building complained of, the books of his children are torn, soiled, carried away, lost and misplaced; their copy-books written on, or thrown to the floor; their slates and pens broken; their ink-stands upset, and their paper wasted and destroyed." We think this shows such an interest as entitles him to a hearing upon the question of the alleged misuser of the school-house. When he pays his taxes, he passes over so much money into the public fund, and the disposition of it is a public duty intrusted to certain public agents; and the fact that he has contributed by the payment of taxes to the creation of this public fund, does not give him a right to challenge the manner of its use. *Craft v. Jackson Co.*, 5 Kan. 518. He is but one of many contributors to the same fund. He has no personal interest in it. But here he shows that his own private property suffers from the alleged wrongdoings. The school books, etc., which he purchases for his children's use are his individual property. They belong in no sense to the

public, and though they may be but a few dollars in value, he is entitled to have those few dollars protected as fully as though thousands of dollars were in danger.

As misuser, he alleges that the "school-house is, by the order of the directors, leased and let to divers societies, meetings, and gatherings," and that thereby large assemblages of persons, both children and adults, gather there, crowding the seats and desks; that these assemblages consume the fuel purchased with the public funds, tear the desks from their fastenings, and cut, scratch and deface them; that some of these meetings are in the night-time, and that at such meetings kerosene or coal oil is used, which is in violation of the terms of the insurance policy on the building, the premium of which has been paid out of the public funds; and that, to accommodate one of these societies, the building has been altered by erecting platforms, rostrums, closets, boxes, etc. In short, he alleges that his building, erected by public funds for the purpose of a school-house, is, by the order of the directors, used for a variety of purposes and gatherings wholly alien to schools and educational matters. It does not appear that this is done against the wishes or without the consent of a majority of the tax payers and electors of the district, nor that the building is leased without receiving adequate rent. Indeed, the question, as it comes before us, may fairly be thus stated: May the majority of the tax payers and electors in a school-district, for other than school purposes, use or permit the use of the school-house built with funds raised by taxation? The question is one which in view of the times, and the attacks made in so many places, and from so many directions, upon our public-school system, justifies, as it has received at our hands most serious consideration. We are fully aware of the fact, that all over the State the school-house is, by general consent, or at least without active opposition, used for a variety of purposes other than the holding of public schools. Sabbath schools of separate religious denominations, church assemblies, sometimes political meetings, social gatherings, etc., are held there. Now none of these can be strictly considered among the purposes for which a public building can be erected, or taxation employed. But it often happens, particularly in our newer settlements, that there is no other public building than the school-house—no place so convenient as that. The use for these purposes works little damage. It is used by the inhabitants of the district whose money has built it, and used for

Spencer v. Joint School District.

their profit or pleasure. Shall it be said that this is illegal? Doubtless, if all in the district are content, no question will ever be raised; and on the other hand, if a majority object, the use for such purposes will cease. It is only when the majority favor, and a minority object, that the courts are appealed to. That minority may be but a single individual, may be influenced by spite, or revenge, or any other unworthy motive, but whatever the motives which prompt the litigation, the decision must be in harmony with the absolute right of all. It seems to us that upon well-settled principles the question must be answered in the negative. The public school-house cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. What cannot be done directly, cannot be done indirectly. As you may not levy taxes to build a church, no more may you levy taxes to build a school-house and then lease it for a church. Nor is it an answer to say that its use for school purposes is not interfered with, and that the use for the other purposes works little, perhaps no immediately-perceptible injury to the building, and results in the receipt of immediate pecuniary benefit. The extent of the injury or benefit is something into which courts will not inquire. The character of the use is the only legitimate question. A municipal bond of five cents, in aid of a purely private purpose, is as void as one of a thousand dollars, and that, too, though the actual benefit to the municipality far exceeds the amount of the bond. The use of a public school-house for a single religious or political gathering is legally as unauthorized as its constant use therefor. True, a court of equity would not interfere by injunction after a single use, and where there was no likelihood of a repetition of the wrong, for it is only apprehended wrongs that equity will enjoin. Here the unauthorized use is charged as a frequent fact, and one likely to occur hereafter. It is unnecessary to pursue this discussion further, for it would be simply traveling over a road already well worn and dusty. Besides the authorities, with which every lawyer is familiar, upon the power to use public funds or property for private purposes, we refer to the following as bearing upon the special phase of the question before us. *Scofield v. Eighth Sch. Dist.*, 27 Conn. 499; *School District No. 8 v. Arnold*, 21 Wis. 657.

Robinson v. Wilson.

The judgment of the District Court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

All the justices concurring.

Judgment reversed.

ROBINSON V. WILSON.

(16 Kan. 555.)

Bankruptcy — homestead — attachment of exempt property.

An attachment was levied on land of a debtor which afterward became his homestead; afterward, and within four months of the attachment, the debtor was adjudged a bankrupt. *Held*, that the homestead did not pass to the assignee in bankruptcy, and that the bankruptcy did not dissolve the attachment.

MOTION by Robinson for an order discharging a judgment against him and in favor of Wilson.

Hulett & McCleverty, for plaintiffs in error.

McComas & McKeighan, for defendant in error.

BREWER, J. This is a proceeding to review the action of the District Court overruling a motion of plaintiffs in error, defendants below, to have satisfaction of a judgment entered of record because of the fact that, after the rendition of the judgment, they had each received a discharge in bankruptcy. The motion was made under section 3 of chapter 12 of the General Statutes. Looking simply at the letter of that section, and it would seem as though the motion ought to have been sustained; for the language is general, and provides that, "in any case in which any person has been or may hereafter be discharged, * * * and shall produce a certificate of discharge * * * to the court in which any judgment is of record, it shall be the duty of any such court to enter a discharge; * * * and thereafter any such judgment shall be deemed fully discharged and satisfied." But this whole statute is based upon and in recognition of the United States Bankrupt Law. It does not intend, even if it were possible so to do, to release par-

ties from debts not discharged under that law. It aims simply to enable a party to obtain in the State courts the benefit of the rights granted to him by the Federal law. So, though it declares that "in any case," upon the production of the discharge, it is the duty of the court, etc., it applies only to those cases in which the bankrupt's discharge does, as a matter of fact, under the Federal law, operate to release and discharge the judgment debt. Any other construction would expose the statute to grave constitutional objections. The question, therefore, is, whether this judgment was one which, by the proceedings in bankruptcy, was released and discharged. If it was, the motion ought to have been sustained ; if not, the motion was properly overruled.

What are the facts concerning the judgment, and the debt upon which it was based? The action in the State court was upon a promissory note — was commenced June 11, 1873, and was accompanied by the issue of an attachment. On the same day this attachment was levied upon three lots in Fort Scott. A motion was subsequently made to discharge the levy of the attachment, on the ground that the property attached was the homestead of one of the defendants, and, therefore, not subject to seizure under either an attachment or execution. But as it appeared upon the hearing that the property did not become a homestead until about the 1st of July, and after the levy of the attachment, the motion was properly overruled. *Bullene v. Hiatt*, 12 Kan. 98. On the 9th of January, 1874, judgment was rendered, and an order made for the sale of the attached property. On the 25th of August, 1873, after the commencement of the action in the State court, and after the property had become a homestead, a creditor's petition in bankruptcy was filed against the plaintiffs in error, and on June 2, 1874, discharges in bankruptcy were granted. During the pendency of the action in the State court, no application was made for a stay of proceedings on account of the proceedings in the bankrupt court. The plaintiff below never proved his debt in the bankrupt court. Was the attachment dissolved, and the judgment debt discharged by the proceedings in bankruptcy? The property attached, being the homestead, and exempt under the State law, at the time of the commencement of the proceedings in bankruptcy, did not pass to the assignee in bankruptcy. It remained the property of the bankrupt, free from any control or interference on the part of the assignee. Nor does it seem to us, notwithstanding some decisions in

the Federal courts to that effect, that the bankrupt took the property as a purchaser from the assignee. The property never passed away from the bankrupt. It remained his, to all intents and purposes, the same as though no bankrupt proceedings had been instituted. U. S. Rev. Stats., §§ 5044, 5045 ; *Rix, Assignee, v. Capital Bank*, 2 Dill. 367 ; Bump on Bankruptcy (7th ed.), 144. We think, too, that as this property remains with the bankrupt, jurisdiction to enforce any liens thereon remains with the State court. Whether the bankrupt court has jurisdiction also, and whether it can stay any proceedings in the State court, we are not to inquire, for those questions are not in the case. *Rix, Assignee, v. Capital Bank, supra* ; *In re Everitt*, 9 Bankr. Reg. 90 ; Bump on Bankruptcy, 146, 461, and cases cited. But it is said that the only lien the plaintiff had was one of attachment created less than four months prior to the commencement of the bankruptcy proceedings, and that the assignment to the assignee dissolved all such attachments, and consequently destroyed any lien. The language of the act is, "and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." (§ 5044.) The subsequent section describes the kinds of property exempt from this assignment. The two sections are, of course, to be construed together, and the section quoted, therefore, should be construed as though it said expressly, "shall vest the title to all such property and estate, both real and personal," as is not exempt from the operation of the bankrupt act, "although the same" (that is, the *unexempt* property, the property conveyed) "is then attached, * * * and shall dissolve any such attachment"—that is, any attachment on the property not exempt, the property transferred by the assignment to the assignee. We are aware of decisions in the Federal courts contrary to these views, and holding that the assignment dissolves all attachments within four months, whether upon exempt property or otherwise. *In re Ellis*, 1 Bankr. Reg. 555 ; *In re Hambright*, 2 id. 498 ; *In re Stevens*, 5 id. 298. We think, however, that the just and fair construction of the act is as we have given it. As the bankrupt court gets no jurisdiction of the ex-

Lewis v. Commissioners of Marshall County.

empt property, it would seem that it should take none over any specific liens upon such property. It may be remarked that the exempt property in this case is exempt, not as among the articles named in the bankrupt act, but as exempt from seizure under attachment and execution by the State law, and, therefore, permitted by the Bankrupt Act to be exempt from its operation. Bump on Bankruptcy (7th ed.), 142-147. That which makes this case one *sui generis*, is the fact that, at the date of the attachment, the property was not exempt from seizure, but was at the time of the commencement of the bankrupt proceedings. The attachment, therefore, was good and created a specific lien upon the property attached. *Bullene v. Hiatt*, 12 Kan. 98. It remained the property of the bankrupt, and the bankrupt court, not taking the property, did not disturb the specific lien. Whether if, after the sale of the attached property, there should remain a balance on the judgment, this balance would be beyond the reach of the bankrupt's discharge, is a matter we need not now inquire. The question may never arise. As the question now stands, we think there was no error in overruling the motion to enter a discharge of the judgment.

The decision of the District Court will be affirmed.

All the justices concurring.

Judgment affirmed.

LEWIS V. COMMISSIONERS OF MARSHALL COUNTY.

(16 Kan. 102.)

Election — canvass of — mandamus.

A canvassing board has no power to throw out returns of votes which are genuine and regular in form on the ground of fraud in the election; and if it does throw out such returns, may be compelled by mandamus to reassemble and make a correct canvass. (*See note, p. 279.*)

MANDAMUS against the commissioners of Marshall county, who constituted the board of county canvassers, to require them to reassemble and properly canvass the votes of said county, cast at an election for the office of county clerk.

Lewis v. Commissioners of Marshall County.

The candidates for said office at said election were the petitioner Lewis and one McIntire, who is made a defendant herein.

The petition alleged in substance that the plaintiff in fact received a majority of the lawful votes cast for said office; that the votes of the several voting precincts in said county were duly returned to the county clerk and duly filed; that the board of county commissioners, constituting the board of county canvassers, duly assembled for the purpose, opened and canvassed the returns from the several precincts, *except the returns from the precinct of Waterville*, and did thereupon determine that the petitioner had received 856 votes, and that said McIntire had received 972 votes for said office of county clerk, and that said McIntire had received the greatest number of votes for said office and was duly elected; whereas the said petitioner alleged that he had received in said precinct of Waterville 280 votes, while the said McIntire received only 91 votes therein; and that if such votes had been canvassed, and they legally should have been, he would have been declared elected.

The commissioners admitted refusing to canvass the return from Waterville and answered that one H. S., and divers other persons to defendants unknown, entered into an unlawful and corrupt agreement and conspiracy to defeat the election of said J. G. McIntire, and to procure the election of said plaintiff; and that in pursuance of said agreement and conspiracy, that said H. S., J. W. S., C. B., E. C. W., and J. A. E., or some of them, with other persons to defendants unknown, on the morning of the election, and before the polls were opened in said Waterville precinct, met at the voting-place in said precinct, and placed in the ballot-box, "fraudulently and unlawfully, a large number of ballots," and that during the day "the persons above stated kept and had in their possession and control the said ballot-box, poll-books, and tally-sheets," etc.; that the "judges and clerks, or some of them, unlawfully and fraudulently received and deposited into said ballot-box over 100 fraudulent ballots." The answer also alleges that "a large number of the persons who voted at said Waterville precinct were voters in other counties of the State of Kansas than that of Marshall county." It also alleges that the "poll-books, tally-lists and ballots" sealed up by the judges of said Waterville precinct "to be delivered to the county clerk were never delivered to said county clerk at any time, but that other fraudulent and spurious poll-books,

Lewis v. Commissioners of Marshall County.

tally-lists, and ballots were returned to said county clerk by said persons, or some of them, and these are the returns which were submitted to the commissioners for canvass, and which plaintiff demanded that said commissioners should count in determining the result of said election."

No testimony was offered at the hearing in support of the defendant's answer. But the original poll-books of said Waterville precinct were produced, and given in evidence; and it appears from them, and from testimony given at the trial, that after the poll-books had been duly and properly signed, attested and sealed up by the judges of the election, and before they were delivered to the county clerk, some person had wrongfully and willfully opened them and changed the vote as cast and certified by the judges for one candidate for *county commissioner*, which alteration would have changed the result as to such candidate and office. No other change or alteration was made or shown. The commissioners, being advised of such alteration, rejected said poll-books entire, refusing to count any votes cast in Waterville precinct for any person for any office.

Martin & Case, for plaintiff.

Mann and Guthrie & Brown, for defendants.

BREWER, J. This is an action of mandamus, to compel a correct canvass of the votes cast in the county of Marshall for the office of county clerk. Upon the canvass that was made the canvassers rejected the returns from Waterville township and declared one J. G. McIntire elected. If those returns had been counted, the plaintiff would have received a majority, and been declared elected. Three questions are presented: First, will the court, after a canvassing board has made one canvass, declared the result, and adjourned, compel it, by mandamus, to reassemble and make a correct canvass on the ground that at the prior canvass it had improperly omitted to canvass all the returns? Second, if the returns are regular in form, and genuine, may the canvassing board reject and refuse to canvass them, on the ground that during the election fraudulent votes were received, and other irregularities practiced by the judges and clerks of election? And third, will the fact that, after the poll-books and tally-sheets have been properly pre-

Lewis v. Commissioners of Marshall County.

pared and signed, and before their delivery to the township trustee and county clerk, they are tampered with and changed by outside parties, so far as respects the votes for candidates for a single office, justify the canvassing board in rejecting the entire returns, and in refusing to count the votes cast for the candidates for the other offices ?

The first question must be answered in the affirmative, and the other two in the negative. We are aware that the authorities are not uniform upon the first question. See on the one hand, *People v. Supervisors Green County*, 12 Barb. 217 ; and, as partially indorsing this view, *The State v. Berry*, 14 Ohio St. 315 ; and on the other side, *The State v. County Judge Marshall County*, 7 Iowa, 186 ; *The State v. Bailey, County Judge*, id. 390. The view taken by the Iowa court seems to us the correct one. It is the duty of the canvassers to canvass all the returns, and they as truly fail to discharge this duty by canvassing only a part, and refusing to canvass the others, as by refusing to canvass any. And it is settled by abundant authority, that where the board refuses to canvass any of the votes it may be compelled so to do by mandamus, and this though the board has adjourned *sine die*. *Hagerty v. Arnold*, 13 Kan. 367, is a case in point. The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. And a candidate has as much right to insist upon a canvass of all the returns, as he has of any part, and may be prejudiced as much by a partial as by a total failure. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of a term of the District Court would prevent this court from compelling by mandamus the signing of a bill of exceptions by the judge of that court, which had been tendered to him before the adjournment. As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which in the first place the duty ought to have been done.

As to the other two questions, it is a common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election, it is apt to imagine that it is its duty to inquire into these alleged frauds, and decide upon the legality of the votes. But this is a mistake. Its

Lewis v. Commissioners of Marshall County.

duty is almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting, and fraudulent practices, are to be passed upon by another tribunal. The canvassers are to be satisfied of the genuineness of the returns, that is, that the papers presented to them are not forged and spurious; that they are returns, and are signed by the proper officers; but when so satisfied, they may not reject any returns because of informalities in them, or because of illegal and fraudulent practices in the election. The simple purpose and duty of the canvassing board is to ascertain and declare the apparent result of the voting. All other questions are to be tried before the court for contesting elections, or in *quo warranto* proceedings. It must be borne in mind that the change in the returns in this case was made after their execution by the proper officers, and before they reached the county clerk's office, was made by unauthorized and outside parties, and not by the election officers, and did not affect the number of votes cast and returned for this plaintiff, or his opponent. Under those circumstances we think the commissioners were not justified in refusing to canvass the returns from Waterville township, so far at least as respects the officers other than the one concerning which the tampering with and changing of the votes was had.

The peremptory writ must be awarded as prayed for.

All the justices concurring.

NOTE. — In *Florida v. Gibbs*, 13 Fla. 55; S. C., 7 Am. Rep. 238, it was held that the Supreme Court had power to issue a writ of mandamus to a board of canvassers that had adjourned *sine die*, requiring it to reassemble and correct a canvass.

In *Clark v. Buchanan*, 2 Minn. 346, it was held that a canvassing board having made a canvass and adjourned *sine die* was *functus officio*, and had no right to reconvene and correct errors in its decisions.

In *Hadley v. Mayor of Albany*, 33 N. Y. 603, it was ruled that when the law has committed to the common council of a city the duty of canvassing the returns and determining the result of an election from them, and the council have performed that duty and made their determination, they have exhausted their power and cannot afterward reverse their decision by making a different determination. See, also, the opinion of the Supreme Judicial Court of Maine upon a case submitted by the governor. 25 Me. 567; 54 id. 602. — RMP.

Sibert v. Wilder.

SIBERT v. WILDER.

(16 Kan. 176.)

Statute of limitations — acknowledgment to a stranger — garnishee.

An acknowledgment of a debt to a stranger will not avoid the running of the statute of limitations ; and, therefore, where defendant was summoned as garnishee of plaintiff in an action brought by a third party, and by his answer admitted that he owed money to plaintiff, *held*, that plaintiff could not, in an action by him against defendant, avail himself of this admission.

ACTION on a promissory note given by defendant and another to one Lykins, in August, 1867. Defendants paid Lykins \$250 on said note, and afterward and in October, 1867, after said note was due and payable, Lykins assigned the note to Sibert. In March, 1868, one Chancellor Livingston commenced an action against said Lykins, and caused said Wilder & Palm to be summoned therein as garnishees of said Lykins. Said action was continued from term to term, and in October, 1873, John H. Wilder, one of the firm of "Wilder & Palm," as garnishee, made his answer, under oath. A copy of such answer is annexed to and made a part of Sibert's petition in this case, and is relied upon by Sibert to take his action out of the statute of limitations. The defendants demurred to the petition. The District Court, at the January term, 1874, sustained the demurrer, and gave judgment in favor of the defendants. Sibert appeals, and brings the case here on error.

Thacher & Stephens, for plaintiff in error.

S. A. Riggs and Nevison, Simpson & Alford, for defendants in error.

BREWER, J. This action was brought to recover the amount of a promissory note given by the defendants, August 29, 1867, and payable one day after date. The petition was filed December 17, 1873, and consequently the demand is barred by the statute unless the cause of action is saved by subsequent acknowledgment. The acknowledgment relied upon to take the case out of the statute is the affidavit of J. H. Wilder, one of the copartners, taken before the clerk of the court, October 30th, 1873, one month and-a-half before suit brought. The language of said affidavit is, "There was due and owing on said note on the 25th day of March, 1868, when notice of garnishment

Sibert v. Wilder.

in this and other cases was served, the amount of said note as above stated, less the \$250. Said note is still outstanding and unpaid at this date, except that I claim an offset on a certificate of deposit issued to said W. H. R. Lykins by one A. E. Baird, dated September 17th, 1867, for \$300, and on a counter-check by said Lykins to one B. W. Fitts, and transferred to me, accompanied by a written order upon Lykins for that amount, dated October 9th, 1867. The firm of Wilder & Palm was and is composed of myself and Andrew Palm." This affidavit was signed by John H. Wilder. The defendant demurred to the petition, and the court below sustained the demurrer.

Three objections are made to this acknowledgment — that it was not voluntary, but enforced ; that it is not the admission of a present and subsisting debt, which the party is liable for and willing to pay, and that it was not made to the creditor, or any one acting for him, but to an entire stranger. As the record appears before us we think the last point well taken ; and without considering the others, upon that decide the case. All that can be gathered from the record is, that this acknowledgment was made in an answer returned by Wilder as garnishee in an action brought against the assignor of the plaintiff. It was not, therefore, made to this plaintiff, or his assignor, or to any one acting for him, but to a party claiming adversely to such assignor. Is such an acknowledgment within the statute ? We think not. It may be conceded that at one time the decisions of the courts were in favor of such a construction. *Peters v. Brown*, 4 Esp. N. P. 46 ; *Clark v. Hougham*, 2 Barn. & Cress. 149 ; *Mountstephen v. Brooke*, 3 Barn. & Ald. 141 ; *Halliday v. Ward*, 3 Camp. 31 ; *St. John v. Garrow*, 4 Porter (Ala.), 223 ; *Whitney v. Bigelow*, 4 Pick. 110. But these rulings grew out of the fact that the statute of limitations was regarded as a statute of presumptions rather than as one of repose. It is well said in 3 Pars. on Cont. (5th ed.) 63, "A very little observation will show that these two views lead to results which are not only distinctly different, but antagonistic. This difference may be stated theoretically thus : If the statute of limitations be a statute of presumptions, then it is taken away by whatever will rebut the presumption, and this is any thing which implies or amounts to an acknowledgment that the debt still exists ; but if it be a statute of repose, then it remains in force unless the debtor renounces its benefit or protection, and voluntarily makes a new

Yandle v. Kingsbury.

promise to pay the old debt." It is perhaps needless to add that the latter is to-day the accepted view. Under that view it is held that an acknowledgment to a mere stranger will not avoid the running of the statute. The acknowledgment of a debt, to take a case out of the statute of limitations, must be made, not to a mere stranger, but to the creditor, or some one acting for him, and upon which the creditor is to act or confide. 2 Story's Eq., § 1521a. See also, as further authorities, *Bloodgood v. Bruen*, 4 Seld. 362; *Wakeman v. Sherman*, 5 id. 85; 5 Nev. 206; *Taylor v. Hendrie*, 8 Nev. 243; 3 Pars. on Cont. (5th ed.) 85; *Collins v. Bane*, 34 Iowa, 385; *F. & M. Bank v. Wilson*, 10 Watts, 261; *Christy v. Flemington*, 10 Penn. St. 129; *Kyle v. Wells*, 17 id. 286; *Johns v. Lantz*, 63 id. 324; *Ringo v. Brooks*, 26 Ark. 540; *Roscoe v. Hale*, 7 Gray, 274; *Keener v. Crull*, 19 Ill. 189; *Farrell v. Palmer*, 36 Cal. 187; *Georgia Ins. Co. v. Ellicott*, Taney, 130.

The judgment will be affirmed.

All the justices concurring.

Judgment affirmed.

YANDLE V. KINGSBURY.

(17 Kan. 195.)

Replevin — measure of damage.

In an action of replevin, where the property in controversy has a usable value, the value of the use of such property during the time of its wrongful detention may be recovered as proper damages. (See note, p. 284.)

REPLEVIN, brought by Kingsbury, to recover the possession of a span of horses, a colt, and a set of harness, alleged to have been wrongfully taken and wrongfully detained by Yandle. A trial was had; verdict and judgment for plaintiff for a recovery of the possession of the property, or for its value, assessed at the sum of \$200, and for \$500 damages for the wrongful taking and detention of the property. New trial refused, and judgment on the verdict. The defendant brought the case up on error.

Hulett & McCleverty, for plaintiff in error.

McComas & McKeighan, for defendant in error.

Yandle v. Kingsbury.

KINGMAN, C. J. This was an action of replevin, brought by the defendant in error. The defendant (plaintiff in error) gave the required undertaking, and retained possession of the property. Two errors are alleged. [The first error related solely to a question of practice.]

The other question raised in the case is as to the measure of damages. The action was replevin. The defendant gave bond under section 182 of the Code, and retained possession of the property. The property consisted of a mule, a mare, a colt, and a set of harness. The jury found for the plaintiff, and found the mule worth \$90, the mare \$80, the colt \$15, and the harness \$15 (total, \$200). The colt had strayed away and come into possession of the plaintiff soon after the suit was instituted. The court instructed the jury that the plaintiff, if entitled to a verdict, was entitled to recover as damages "the actual worth of the use of the property, above the expense of keeping the same, from the time it was wrongfully detained by defendant." The jury returned a verdict for five hundred dollars damages for the detention of the property. The large disproportion between the value of the property, as found by the jury, and the damages they returned, naturally raises the question as to whether the rule laid down by the District Court is correct. The plaintiff in error claims that the only damages recoverable are, interest on the value of the property for the time it was wrongfully detained. It may be stated as a general rule in replevin, that such is the measure of damages; but though this is a general rule, it is by no means a universal one; and one of the most generally recognized exceptions is, where the property in controversy has a usable value. In such case, the owner's damages are the loss of the use of the property for the time it is detained, and nothing less than this is a compensation for his injuries. In the case of *Allen v. Fox*, 51 N. Y. 562; S. C., 10 Am. Rep. 641, the learned judge delivering the opinion of the court has suggested a number of supposable cases where interest would be a grossly inadequate compensation; but in none of the cases that occurred to him would interest, only as damages, be such a mockery of the term as is presented in this case. From the record we learn that the mare and mule made a team, and the only one owned by defendant in error, and used by him for carrying on his farm; that on the 21st of May they were seized by the plaintiff in error without a pretext of ownership, and retained for sixteen

months and seven days until the final trial, plaintiff in error avowing that his object was to prevent the owner from making a crop, and thereby breaking him up and compelling him to leave the neighborhood, saying to more than one witness that he would have to pay interest on the value of the property seized. For this loss the plaintiff in error thinks that \$18.96 (the interest at seven per cent per annum on \$200 for sixteen months and seven days) would be an adequate compensation, as the defendant in error could have readily bought another team, as it was a species of property common in the country, and there was no difficulty in the defendant in error buying another team at a reasonable price; and had he have done so, the only damage he would have sustained would have been the use of the money for the time. It might be an answer to this reasoning to say, that on the plaintiff in error's own declaration, the owner could not buy another team as he was not able to do so, a condition of things not uncommon in a new country. While this answer ought to be conclusive, so far as this plaintiff in error is concerned, it is not such an one as should be laid down as the basis of a rule; and a better one is at hand. The object of the plaintiff in replevin is the possession of his property. If he succeeds in his suit, he is compelled to take the property, if the defendant so wills. Then the plaintiff has (if he has bought in the meantime) two teams, when he wants but one, while the defendant has had the use of one of them by merely paying interest on the value of the property. This would not be compensation, which is the real object in damages, wherever damages are allowable at all. It is true, that general rules will not in all cases give adequate damages; but it is the object of the law to do so whenever such a result does not break down some settled rule of law.

The judgment of the court below will be affirmed.

VALENTINE, J., concurring.

BREWER, J., dissented.

Judgment affirmed.

NOTE. — The rule of the above case as to the measure of damage was adhered to in *Ladd v. Brewer*, 17 Kan. 204, and in *Bell v. Campbell*, id. 211. In the latter case, VALENTINE, J., delivered the opinion of the court, which was as follows, on this point:

VALENTINE, J. "This was an action of replevin for a horse, buggy and harness. The defendants (now plaintiffs in error) gave a bond under section 182 of the Civil Code, and retained possession of the property pending the action. At the trial of the case the court below gave to the jury the following among other instructions, to wit:

Yandle v. Kingsbury.

"If you find for the plaintiff in said cause, you will assess his damages at the value of the use of the property taken by the defendants from the time of the taking of the same up to the present time."

The jury did find in favor of the plaintiff and against the defendants, and assessed the value of the property in controversy at \$475. They also, in accordance with said instruction, assessed the plaintiff's damages for the unlawful detention of the property at \$210. Seven per cent interest on the value of the property for the time it was unlawfully detained would have amounted to \$87.27. The plaintiff then remitted all the damages in excess of \$87.27, and the court below then rendered judgment in favor of the plaintiff (now defendant in error) and against the defendants for a recovery of the property in controversy, or in case the property could not be obtained, then for the value thereof, to wit, \$475, and for said \$87.27 damages, and also for costs of suit.

The plaintiffs in error claim that the court below erred as to the measure of damages. They claim that the true rule for the measure of damages in such cases as this is the interest on the value of the property while wrongfully detained, and is never the value of the use of such property. We think, however, the court below did not err in this respect. We have just decided two cases in which we have substantially sustained the ruling of the court below in this particular. *Yandle v. Kingsbury*, ante, 195, and *Ladd v. Brewer*, ante, 204. It is true, that interest on the value of the property wrongfully detained is sometimes, in replevin cases, considered as the proper measure of damages. But it never was considered as the only damages which might be allowed in replevin cases. And in the nature of things it should not be. In some cases deterioration of the property from injury, neglect, etc., while wrongfully detained, must be considered as an element in the allowance of damages. In other cases, the decrease in the market value of the property must be taken into consideration. In other cases, perhaps few, gross malice, fraud, and oppression may be taken into consideration for the purpose of giving exemplary damages. *Herdie v. Young*, 55 Penn. St. 176; *Cable v. Dakin*, 20 Wend. 172. In other cases, the value of the use of the property must be taken into consideration for the purpose of giving compensatory damages. *Allen v. Fox*, 51 N. Y. 562; *Morgan v. Reynolds*, 1 Mont. 163; *Butler v. Mehrling*, 15 Ill. 488; *Robbins v. Wallers*, 2 Tex. 130; *Dorsey v. Gassaway*, 2 Harr. & Johns. 402, 413; *Gibbs v. Cruikshank*, 8 C. P. 454; *Williams v. Phelps*, 16 Wis. 81; *Glascock v. Hays*, 4 Dana (Ky.) 58; *Hall v. Edrington*, 8 B. Monr. 47, 48; *Hudson v. Young*, 25 Ala. 376. The last three relate to detinue, the others to replevin. And still in other cases other damages than those above mentioned are sometimes allowed in actions of replevin. In Massachusetts, in an action of replevin, where part of a manufacturer's machinery was taken and wrongfully detained, it was said by the court that the damages "would be made up of, 1st, interest on the money-value; 2d, the general inconvenience and loss resulting from the interruption of his possession; and 3d, the expense, trouble and delay attending the operation of replacing every thing, and restoring the establishment to its original condition." *Stevens v. Tuite*, 104 Mass. 328, 335. Indeed, in every action of replevin the plaintiff or the defendant, as the case may be, should be allowed to recover all the damages, not too remote, which he has actually sustained by reason of the wrongful detention of the property, in whatever way such damages may have resulted. Exact compensation for his loss is the true rule. In a late case in England, decided in 1873, BRETT, J., says: "Replevin is a common-law action for the taking of goods. By the course of procedure in that action the goods are returned in the course of the action. It was argued

IN October, 1870, Joseph D. Rollins made and delivered to Mitchell his promissory note for \$2,500, with interest at 12 per cent from date, payable in six months from the date thereof, and Rollins and wife executed a mortgage on real estate to secure the same. Payments upon said note were made to the amount of \$1,620 prior to August, 1873. In June, 1873, said Rollins and wife executed and delivered to Pritchett their note for the sum of \$3,100, with interest, and their mortgage to secure the payment of the same; and in August, 1873, said Rollins made and delivered to Pritchett his note of that date for the sum of \$400, with interest, and jointly with Mary E., his wife, gave a mortgage to secure the same. Said three mortgages were respectively duly recorded, and covered the same real property. In August, 1873, and after the first mortgage from Rollins to Pritchett had been duly recorded, Mitchell brought an action to foreclose his mortgage, making Rollins and wife sole defendants therein, and on the trial thereof, no defense being made, the court gave judgment in favor of Mitchell, in November, 1873, for \$1,526.50, together with the additional sum of \$126 as attorney-fees for foreclosure, and thereupon decreed a sale of the property, and application of the proceeds in satisfaction thereof, to all which proceedings Pritchett was a stranger. In December, 1874, Pritchett brought his action to foreclose the two mortgages given to him, in which action Mitchell was joined with Rollins and wife as co-defendant. Mitchell answered, setting up the former judgment, together with the note and mortgage upon which it was based. Pritchett replied, alleging usury in the Mitchell note and judgment to the amount of \$646.50. Rollins and wife made default. Trial at the February Term, 1875, of said District Court. Pritchett offered evidence to show — *first*, that said Joseph D. Rollins and Mary E. Rollins were insolvent at the time said action was commenced, and ever since; *second*, that the mortgaged premises were insufficient to pay both the claim of said Mitchell and of Pritchett; and *third*, that payments were made by said Rollins to Mitchell, on the Mitchell note and mortgage, by way of usurious interest and inducement to contract for more than twelve per cent per annum. Mitchell objected, and the evidence was rejected. Judgment was rendered, that the entire amount of the former judgment in favor of Mitchell, be a first lien on said mortgaged premises, to which Pritchett excepted, and he now brings the case here on error.

Pritchett v. Mitchell.

Nevison & Alford, for plaintiff.*John W. Day*, for defendant in error.

BREWER, J. Can a second mortgagee plead usury in a prior mortgage? Can he do it either to defeat, or postpone, the lien of such prior mortgage? Authorities are well divided on this question. That he can, is affirmed in Indiana, Pennsylvania, Ohio, New York, Maryland, and New Jersey. *Cole v. Bansemer*, 26 Ind. 94; *Greene v. Tyler & Co.*, 39 Penn. St. 361 (though under the present statute the opposite ruling seems to obtain, *Miners' Trust Co v. Roseberry*, 2 Law & Eq. Rep. 478); *Union Bank v. Bell*, 14 Ohio St. 200; *Brooks v. Avery*, 4 Com. 225; *Post v. Dart*, 8 Paige, 639; *Banks v. McClellan*, 24 Md. 62; *Cummins v. Wire*, 6 N. J. Eq. 73. That he cannot, is affirmed in Alabama, Connecticut, Illinois, Iowa, Kentucky, Michigan, Missouri, and Vermont. *Cain v. Gimon*, 36 Ala. 168; *Fielder v. Varner*, 45 Ala. 429; *Loomis v. Eaton*, 32 Conn. 550; *Adams v. Robertson*, 37 Ill. 45; *Powell v. Hunt*, 11 Iowa, 430; *Huston v. Stringham*, 21 id. 36; *Carmichael v. Bodfish*, 32 id. 418; *Campbell v. Johnston*, 4 Dana (Ky.), 177; *F. & M. Bank v. Kimmel*, 1 Mich. 84; *Ransom v. Hays*, 39 Mo. 445; *Austin v. Chittenden*, 33 Vt. 553. These last two cases were not mortgage cases, but the decisions plainly indicate the judgments of the courts upon the question. See, also, 3 Pars. on Cont. 122; *Ladd v. Wiggin*, 35 N. H. 421; *De Wolf v. Johnson*, 10 Wheat. 367; *Green v. Kemp*, 13 Mass. 515. We incline to the latter view, and to regard the plea of usury as a personal privilege. When the parties to a contract are willing to abide by its terms, why should one, not a party thereto, be permitted to interfere? If the debts were unsecured, no one would think that the second creditor had any right to interfere. The payer, by payment of the first note according to its terms, and without insisting on any plea of usury, might so diminish his means as to render himself unable to pay the second note, but still that would not give the holder of the second the right to restrain such payment. And the rule would be the same if the securities for the two notes were separate and distinct. Why then should the mere giving of a single security for the two notes enable the holder of the second to interfere? And a mortgage with us, it will be borne in mind, conveys no estate in the land, but is simply a security for the debt. *Chick v. Willetts*, 2 Kan. 384. The

second mortgagee, it is true, could increase the value of his security by diminishing the amount of the first lien; but he does so only by preventing parties who have made a contract, and are willing to abide by its terms, from complying with that contract. When the first mortgage was given, the land-owner had a perfect right to give it. The land stood charged with the lien as he placed it, and no one but he could question the validity of the lien for the entire amount. He still remains willing to abide by the terms of that contract, willing that the land should be held for the face of the note. The taking of the second mortgage was a voluntary matter. The mortgagee finds the property charged with a mortgage, pledged therefor as security for a specified amount, finds that the mortgagor intends that it shall be used in discharging that amount of indebtedness, and voluntarily takes the property thus burdened, as security for his own debt. It is with ill grace that he thereafter endeavors to prevent the mortgagor from complying with his first contract. Yet even those who are loth to break their own promises, are often willing that others shall, if thereby their own interests are promoted. Surely a man ought to have a right to say whether he shall keep his own promise or not. In the enactment of laws, usury laws as well as others, the legislature has regard to the general interests, the welfare of the majority. Its laws, therefore, often bear hardly in individual instances. And while it may be generally true that a limit to the amount to be paid for the use of money should be fixed, yet every one knows that sometimes such amount is not what in justness and fairness ought to be paid. Men feel honorably bound to pay more than the law authorizes. While the law ought to protect the party from the clamps of the usurer, by permitting him to repudiate all but the legal interest, yet if the borrower feels in honor bound by the peculiar circumstances of his loan to pay the stipulated interest, it would seem as though no stranger to the transaction should be permitted to interfere.

The judgment will be affirmed.

All the justices concurring.

Judgment affirmed.

NOTE. — See *Hough v. Horsey*, 36 Md. 181; S. C., 11 Am. Rep. 484, holding that where plaintiff purchased real estate subject to a mortgage, and as part of the consideration agreed to pay the mortgage, he could not maintain a bill in equity to restrain a sale of the premises by the mortgagee under a power in the mortgage on the ground that the mortgage was usurious. The same rule

Pritchett v. Mitchell.

was held in *Cramer v. Lepper*, 26 Ohio St. 59; S. C., 20 Am. Rep. 756. See, also, *McArthur v. Schenck*, 31 Wis. 673; S. C., 11 Am. Rep. 643.

In *The Knickerbocker Life Ins. Co. v. Hill*, 6 T. & C. 286, the Supreme Court of New York held that the purchaser of real estate at a sale under the foreclosure of a mechanic's lien was entitled to set up the defense of usury against a mortgage existing prior to the sale; and in *Cavan v. Kelly*, 3 Alb. L. Jour. 373; S. C. as *Carow v. Kelly*, 59 Barb. 239, the same court held that an execution creditor, having a levy, may avoid a prior chattel mortgage for usury upon the ground that while the defense of usury is a personal one, it avails to all who succeed to the personal. And see *Dix v. VanWyck*, 2 Hill, 522; *Mason v. Lord*, 40 N. Y. 476; *Post v. Dart*, 8 Paige, 639; *Thompson v. VanVechten*, 27 N. Y. 568.

In a proceeding for the distribution of the surplus, after a sale of real estate under the foreclosure of a mortgage, a subsequent mortgagee can defeat a mortgage prior to his own for usury. *Mut. Life Ins. Co. v. Bowen*, 47 Barb. 618.

The right to set up usury is so far personal that it cannot be transferred alone; an assignee or grantee can only avail himself of it in protection of his own title to the property. *Bullard v. Raynor*, 30 N. Y. 197; *Boughton v. Smith*, 26 Barb. 635. So a mortgagor, after he has sold the chattels covered by a mortgage, cannot sustain an action to cancel the mortgage on the ground of usury. *James v. Oakley*, 1 Abb. Pr. 324.

That one who has purchased mortgaged premises generally and not the mere equity of redemption can set up usury in the mortgage was held in *Brooks v. Avery*, 4 N. Y. 226; *Lynde v. Staats*, 1 N. Y. Leg. Obs. 89; *Vickery v. Dickson*, 62 Barb. 272; *Cole v. Savage*, 10 Paige, 583; and see *Jackson v. Dominick*, 14 Johns. 436; *Berdan v. Sedgwick*, 40 Barb. 359.

The purchaser of a mere equity of redemption cannot set up usury against a mortgage. *Ferris v. Crawford*, 2 Den. 595; *Green v. K...p*, 13 Mass. 515; *Wells v. Chapman*, 13 Barb. 561. Nor can one who takes a mortgage expressly subject to the mortgage. *Morris v. Floyd*, 5 Barb. 120; *Hartley v. Harrison*, 24 N. Y. 170; *De Wolf v. Johnson*, 10 Wheat. 367. Nor one who takes subject to any indebtedness of his assignor. *Murray v. Barney*, 34 Barb. 336.

From a carefully prepared article on this subject in 13 Alb. Law Jour. 39 and 71, we make the following extract:

"It was held by the Vice-Chancellor in *Pearsall v. Kingeland*, 3 Edw. 195, that the assignee for the benefit of creditors, under a general assignment, might set up usury in a contract of loan to his assignor. And see *Pratt v. Adams*, 7 Paige, 615. Otherwise as to a debt the payment of which was specifically provided for in the assignment, at least so as not to prevent the creditor from receiving the amount equitably due (id.), even though the assignee be also a creditor of the estate, he having estopped himself by accepting the trust, which is necessarily subject to the provision for the usurious debt. *Green v. Morse*, 4 Barb. 332. A creditor of an assignor for benefit of creditors was not allowed (in the absence of fraud) to set aside the assignment for usury in a transaction upon which a judgment, a preferred debt under the terms of the assignment, was based, since, by the recognition of it in this form by the debtor, the right to set it aside was waived. *Murray v. Judson*, 9 N. Y. 73; and see *Mills v. Carnly*, 1 Bosw. 159. This principle of waiver had been explicitly recognized in *French v. Shotwell*, 5 Johns. Ch. 555, as against the purchaser of real property from a debtor who had confessed judgment on an usurious security. Chancellor KENT intimates that such confession of judgment would estop even the judgment debtor himself. In the prior case of *Jackson v. Henry*,

Pritchett v. Mitchell.

10 Johns. 185, in which the same learned jurist, as chief justice, had delivered the opinion of the court, the heirs of a mortgagor attempted, unsuccessfully, on the ground of usury in the mortgage, to sustain an action of ejectment against the *bona fide* assignee for value of the mortgage, who was also grantee of the purchaser at a sale under a power therein. But subsequent to the two last-mentioned cases, in *Jackson v. Dominick*, 14 Johns. 485, opinion by VAN NESS, J., the purchaser from the mortgagor, suing in ejectment the mortgagee who had bought in the property at a sale under a statute foreclosure, was permitted to set up usury in the mortgage. The Court of Appeals, *Bullard v. Raynor*, 30 N. Y. 197, have held that the statement of an account containing an usurious item between debtor and creditor, with the application of the debtor's funds in the hands of the creditor to the payment of the item, estopped the assignee of the debtor from setting off the item against the creditor as usurious. Compare *Berden v. Sedgwick*, 40 Barb. 859. It would seem from the decision in *Berdan v. Sedgwick*, just cited, that an omission on the part of the debtor to assert usury when sued on the bond alone, and the recovery of judgment thereon, does not estop his vendee of the mortgaged property, who did not take subject to the mortgage, from interposing it as a defense to a foreclosure suit. The mortgagor had, however, in this case attempted to set up usury in an action against him alone on the mortgage, in which action judgment for him had been reversed, and the suit discontinued. According to the same authority, the giving of a bond and mortgage in escrow, by the mortgagor, as security in case the usurious one is set aside, is no estoppel on such purchaser.

After recovery of a judgment and payment of it, the money cannot be recovered back in equity on the ground of usury in the original transaction. *Bartholomew v. Yaw*, 9 Paige, 165; reversing *Clarke's Chan.* 16; and see *Campbell v. Morrison*, 7 Paige, 158; *Williams v. Lockwood*, *Clarke's Chan.* 172. Nor can the defendant after such recovery, and giving a new security, avail himself of the usury. *Cromwell v. Delaplaine*, 5 N. Y. Leg. Obs. 226. So part payment and giving a new check in part has been held to estop the drawer sued on the new one. *Smalley v. Doughty*, 6 Bosw. 66.

In *Real Estate Co. v. Seagreave*, 49 How. Pr. 489, decided in the New York Superior Court, at Special Term, it was decided that a covenant by the mortgagee, with an affidavit by the mortgagor that the mortgage was a valid security, estopped them, and all under them, from setting up usury against a purchaser in good faith. But in *Payne v. Burnham*, 4 N. Y. Sup. 678, an affidavit by the mortgagor was held not to estop him, though it was relied upon by the assignee. Of course a certificate of the validity of the security is no estoppel as between the parties to the mortgage. *Van Sickle v. Palmer*, 3 N. Y. Sup. 612.

In *La Farge v. Herter*, 9 N. Y. 241, the court refused to hear plaintiff reply that a bond and mortgage, pleaded in the answer as accepted by him in satisfaction of the cause of action sued on, were usurious, plaintiff being the usurer. So where a surety, sued as such, pleads a discharge by reason of an extension of time given by plaintiff to the principal debtor, plaintiff will not be heard to show that the agreement for the extension was usurious. *Billington v. Wagoner*, 33 N. Y. 81; *Draper v. Trescott*, 29 Barb. 401.

The defendant (payee and indorser of a promissory note), in *Mason v. Anthony*, 8 Keyes, 609, was held to have been estopped, by his representations that the note in suit was not usurious, from setting up the defense of usury. In *Truscott v. Davis*, 4 Barb. 496, however, it was held that representations by an ac-

Pritchett v. Mitchell.

accommodation indorser, that the note sued on was business paper, did not estop him from pleading usury.

It has already been stated that a grantee or assignee of a borrower is not within the provisions of 1 R. S. 772, § 8, allowing the borrower relief in equity against a usurious instrument or contract, without repaying the sum loaned. And see *Bissell v. Kellogg*, 60 Barb. 617; *Gervig v. Shetterly*, 64 id. 620; affirmed. 56 N. Y. 214. And this exclusion from the benefits of that statute was made in a case where the assignee was the borrower himself, who sued, however, in the character of purchaser at a bankruptcy sale. *Schermerhorn v. Talman*, 14 N. Y. 98.

Under the decision in *Beecher v. Ackerman*, 1 Robt. 30; S. C., 1 Abb. Pr. (N. S.) 141, however, the complaint need not contain an offer to pay the sum equitably due, or should not be dismissed for omitting it, but such payment may be provided for in the decree. And see *Morgan v. Schermerhorn*, 1 Paige, 544.

A surety, who becomes such at the time of the principal contract (as well as personal representatives, or heirs or devisees of the property mortgaged), would seem to be able to have relief against usury in the contract at law or in equity. *Post v. Bank of Utica*, 7 Hill, 391; *Livingston v. Harris*, 11 Wend. 329, 336; though the principal debtor do not elect to avail himself of it. *Morse v. Hovey*, 9 Paige, 197; *Bullock v. Boyd*, Hoff. Ch. 294. But in equity proceedings the surety must allege, or make payment of the sum actually loaned. *Allerton v. Belden*, 49 N. Y. 373; reversing 3 Laus. 492; following on this point the remarks of BRONSON, J., in *Vilas v. Jones*, 1 N. Y. 274, and overruling *Post v. Bank of Utica*, above; *Morse v. Hovey*, above; and *Perrine v. Striker*, 7 Paige, 598; and so must accommodation indorsers. *Allerton v. Belden*, above; though to the contrary had been *Hungerford's Bank v. Dodge*, 30 Barb. 626. It seems, however, that an accommodation acceptor need not offer nor make repayment in order to obtain relief in equity. *Taylor v. Grant*, 3 Jones & S. 353.

If an accommodation indorser voluntarily takes up the usurious note after protest, the maker can successfully defend an action upon it brought against him by the indorser. *Hooper v. De Long*, 5 Jones & S. 127; and see *Jewell v. Wright*, 30 N. Y. 259.

Accommodation indorsers of a note made and payable in the State of New York, and negotiated in Canada at a rate of interest valid there, though usurious in New York, were allowed in *Cloyes v. Hooker*, 6 N. Y. Sup. 448, to defend, on the ground of usury in the negotiation of the note by the makers, an action on the note brought in New York.

Such a defense was not recognized as sufficient in an action on a note dated and payable and valid in Massachusetts, although the action was brought in New York. *Agricultural National Bank v. Sheffield*, 4 Hun, 421.

In an action by a remote indorsee against the first indorser, the latter cannot set up as a defense that the note was discounted at an usurious rate by his immediate indorsee. *Morford v. Davis*, 28 N. Y. 481.

A guarantor of a pre-existing usurious debt, whose bond recited the payment to the debtor of the whole principal sum claimed in an action against him, was not allowed to avail himself of the usury. *Mann v. Eckford's Executors*, 15 Wend. 502. Nor in an action upon a guaranty to indemnify the makers of a note due at the time the guaranty was made, was the guarantor heard to interpose usury in the note. *Churchill v. Hunt*, 3 Den. 321."

See note to *Cramer v. Lepper*, 20 Am. Rep. 756.—RMP.

CASES
IN THE
SUPREME COURT
OF
OHIO.*

WEST, plaintiff in error, v. THE CITIZENS' INSURANCE COMPANY.

(27 Ohio St. 1.)

Fire insurance — condition against assigning policy — assignment to partner.

Policies of insurance, like other contracts, are to receive a reasonable construction, so as not to defeat the intention of the parties.

A policy of insurance, issued to a mercantile partnership on a stock of goods owned by the firm, and with which they are carrying on business, which contains no provisions limiting or restricting alienation of the property, is not avoided by a sale by one partner to his copartners, who continue the partnership business, of his interest in the stock of goods.†

* The cases in 27 and 28 Ohio St. were decided by the Supreme Court Commission—a court appointed to clear up an arrearage of business, and of concurrent authority and jurisdiction with the Supreme Court. The Commission adopted the following rule of the Supreme Court, under which the syllabus of each case was prepared by the judge writing the opinion, and as these syllabi have the sanction of the court, it has been thought advisable to retain them:

“**RULE VI** A syllabus of the points decided by the court in each case shall be stated in writing, by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the facts of the case that have been determined by the court. And the syllabus shall be submitted to the judges concurring therein for revision before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein.”

† See, to the same effect, *Dermant v. Home Mut. Ins. Co.* (28 La. Ann. 60), 21 Am. Rep. 544; *Cowan v. Iowa State Ins. Co.* (40 Iowa St. 551), 20 id. 582.

West v The Citizens' Insurance Company.

When the policy contains a provision that the assignment of the same, or any interest therein, without the assent of the company indorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy, does not avoid it. In case of loss after such sale and transfer, the remaining partners, being the real parties in interest, should sue on the policy, and in such action they are not limited in the amount of recovery, to their interest in the partnership goods before such sale and transfer but can recover for the whole loss.

ACTION by George H. West and two others, formerly comprising (with Henry F. West) the firm of "H. F. West & Co.," on a policy of insurance against fire, issued to said firm by the defendant. The defendant demurred to the petition. The opinion states the case

Hoadly, Johnson & Co., for plaintiffs in error.

Matthews, Ramsey & Matthews, for defendant in error. The single question presented by the record is, whether the assignment by one of the partners, to his copartners, or his interest in the policy and property insured, before loss, defeats the recovery of the plaintiff

The affirmation of this proposition is sustained by May on Insurance, § 280; *Dreher v. Aetna Insurance Co.*, 18 Mo. 128; *Flanders on Insurance*, 428. And see *Hoffman v. Aetna Insurance Co.*, 32 N. Y. 405, where the history of the law on this question in the State of New York is given. *Tillou v. Kingston Mutual Insurance Co.*, 7 Barb. 570; 5 N. Y. 405; *Murdock v. The Chenango County Mutual Insurance Co.*, 2 Comst. 210; *Wilson v. The Genesee Mutual Insurance Co.*, 16 Barb. 511; *Hobbs & Henly v. Memphis Insurance Co.*, 1 Sneed, 444; *Howard & Ryckman v. The Albany Insurance Co.*, 3 Denio, 301; *Tate v. Mutual Fire Insurance Co.*, 13 Gray, 79; *Wood v. Rutland and Addison Mutual Insurance Co.*, 31 Vt. 552; *Barnes v. Union Mutual Fire Insurance Co.*, 51 Me. 110; *Hoxsie v. Providence Mutual Fire Insurance Co.*, 6 R. I. 517; *Finley v. Lycoming Co. Mutual Insurance Co.*, 30 Penn. St. 313; *Buckley v. Garrett*, 47 id. 280; *Baltimore Fire Insurance Co. v. McGowan*, 16 Md. 47; *Dix v. Mercantile Insurance Co.*, 22 Ill. 272; *Keeler v. Niagara Fire Insurance Co.*, 16 Wis. 523; *Hartford Fire Insurance Co. v. Ross*, 23 Ind. 181; *Dreher v. Aetna Insurance Co.*, 18 Mo. 128.

West v. The Citizens' Insurance Company.

JOHNSON, J. The question in this case arises on a demurrer of the defendant to the petition, alleging that said petition did not state facts sufficient to constitute a cause of action.

The plaintiffs sue as individuals, and not in the partnership name, and claim to recover on a policy of insurance against fire, on a stock of goods in Indianapolis, for one year, from April 17, 1869, to April 17, 1870.

The original policy was issued April 17, 1866, for one year, and was renewed each year thereafter, the last renewal being on 17th of April, 1869. It was issued to the firm of H. F. West & Co., composed of the plaintiffs and one Henry F. West, who on the 1st of December, 1869, retired from the firm, and assigned all his interest in said policy and stock of goods to his copartners, the plaintiffs, who continued the business.

The stock of goods was consumed by fire, December 17, 1869. Hence this action.

By the terms of the policy, the defendant contracted "to make good to the insured, their executors, administrators, or assigns, all such immediate loss or damage as shall happen by fire to the said property."

Upon the foregoing facts, but one question is presented. That is. Did the assignment by Henry F. West of his interest in the policy and stock of goods avoid the policy or prevent a recovery thereon — the assent of the company to such transfer not having been given thereto?

This question must be determined by giving a construction to the terms and conditions of the policy. In form and language, it is an agreement between two parties, the insurer and the insured, though executed only by the insurer.

The only clause relating to such a transfer is in the words following: "*And it is further agreed * * * that if this policy, or any interest therein, shall be assigned, unless, in either case, the assent thereto of said company be indorsed hereon, these presents shall thenceforth be null and void.*"

It will be observed that this policy (which is part of the record) is a contract with a partnership, and not with the individuals composing it; that, as such partners, they owned the stock of goods, and were doing business therewith in the usual way.

It is also important to note that the policy contains no provisions relating to alienation of the property, or prescribing any mode of

West v. The Citizens' Insurance Company.

continuing the policy, in case of sale of the goods, by obtaining assent of the company thereto. Such provisions are to be found, we believe, in most insurance contracts.

The clause above quoted relates only to an assignment of the *policy*, or any interest therein, and is silent as to the alienation of the property insured.

Ordinarily, this omission is unimportant, for it is well settled that in such case, when the insured, by alienation or otherwise, parts with all his insurable interest in the property insured, he cannot, in case of loss, recover, because, having no interest in the property destroyed, he has sustained no damage. Neither can the assignee of the policy, without the assent of the insurer, recover, because he is a *stranger* to the contract, whom the company is not bound to recognize.

In the examination of the numerous cases cited, this omission is an important element, as very many of them turn on the words limiting and restricting alienation. Thus, in *Dix v. Mercantile Insurance Co.*, 22 Ill. 272, and *The Hartford Insurance Co. v. Ross et al.*, 23 Ind. 181, there was this clause, upon which the cases largely turned: "And in case of any transfer or change of *title* in the *property*, or of any *undivided* interest therein, such insurance shall be void and cease." They were cases much like the one before us; and stress is laid by the court on the words "undivided interest," as correctly describing a partner's interest. So, also, in many other cases, the peculiar wording of these clauses relating to alienation enter largely into the discussion of the legal aspects of the case, in the opinion of the courts deciding them.

As to such clauses, it is sufficient to say that, as a general rule, their only effect is to either enlarge or restrict the right, which exists without them, to bring an action by the assured in case of loss. If the assured still retains such an insurable interest in the property, as that he sustains a loss by the fire, he can, to the extent of that loss, recover; otherwise, if he has parted with all such interest, for then no damage has resulted to him.

Great care should also be taken to distinguish between those cases decided by an application of the common-law rules of pleading and those which are made to depend solely on the rights of the parties growing out of the terms of the contract itself. The former depend on *who are the proper parties to the action at common law*,

West v. The Citizens' Insurance Company

the latter on the *terms of the contract*; and from these terms the court must determine the existence, extent, and character of the obligations and liabilities of the parties to the contract. The one is to be decided by the rules of pleading, the other by a construction of the stipulations of the policy.

Since the adoption of our Code, under which the real party in interest may sue, whether the contract is joint or several, the former class of decisions becomes unimportant. There can be no doubt that if the common-law rules of pleading were in force in Ohio, the plaintiffs could not recover—not because they had no insurable interest, for they owned all the property covered by the policy; nor because they sustained no damage, for that is admitted; but solely for the reason that this was a *joint* contract by the insured, and all must be joined as plaintiffs. By these rules, if all were so joined, they still could not recover, because Henry F. West, one of the joint contractors, had parted with all his insurable interest by a sale. In either case, the result would alike be fatal to these plaintiffs, who have sustained all the loss against which they indemnified; and the rights of the parties, and the liabilities of the insurers, arising from the terms of the policy, would remain undetermined by the court.

In *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210, one tenant in common sold his interest in the property insured to his co-tenant. The action was in the name of *both*, though the company had assented to the sale. It was held that the *misjoinder* was fatal. On the other hand, *Tate v. Citizens' Ins. Co.*, 13 Gray (Mass.), 79, was a case like the former, except that the action was in the name of the co-tenant, who had become sole owner by purchase. It was held that the *non-joinder* was alike fatal, Judge BIGELOW saying: "Upon familiar principles, both the joint contractors should join in bringing the action, * * * and the omission to join them is a good defense."

In both cases the parties were sent out of court without their rights adjudicated, by the application of the "familiar principles" of common-law pleading.

Under the Code, the real party in interest must sue. In this case the suit is properly brought, but the right of recovery does not depend on questions of misjoinder or non-joinder of parties, but upon the liability of the insurers growing out of the contract. Is the defendant, therefore, liable to the plaintiffs by the terms of

West v. The Citizens' Insurance Company.

this policy? To determine this question, reference must be had to the familiar rules of construction.

The policy should receive a reasonable interpretation. Its intent and substance should be ascertained from the language employed. Its stipulations should have full legal effect, to guard the insurer against fraud and imposture. As it is a contract of indemnity to the insured, it should be liberally construed in his favor, not only because this mode of construction is most conducive to trade and business, but because it is probably most consonant with the intentions of the parties. There is no more reason for a strict compliance with its terms than ordinary contracts. There is nothing in such a contract intrinsically more sacred or inviolable than a contract about any other subject. 25 Wend. 374. Exceptions in a policy should be strictly construed, and when there are two interpretations equally fair, that which gives the greater indemnity should prevail. May on Insurance, § 174.

None of these rules is more fully established or more imperative and controlling than that which declares that it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making his insurance, it was his object to secure; and when the words "without violence" are susceptible of two interpretations, that which will sustain the claim and cover the loss must in preference be adopted. May on Insurance, § 175.

Guided by these principles, let us examine the terms, which, it is claimed, avoid this policy.

The natural reading of these terms, "if this policy or any interest therein be assigned," would seem to be completed by adding after the word "assigned" the name of the contracting party, so as to read, "if this policy or any interest therein be assigned *by said H. F. West & Co.*," H. F. West & Co. alone could make an assignment of the *title* to the policy. Henry F. West did not assign the policy or any interest in it which the firm had. The partnership name must be used to transfer the policy or any definite interest therein.

The cases are numerous where it has been held, that to constitute alienation of the property, a conveyance of the title, and nothing short of this, would amount to an alienation; that "transfer of the title of property insured," means the title and owner-

West v. The Citizens' Insurance Company.

ship of property insured, and *not the interest of the insured therein*. *Masters v. Madison Co. Ins. Co.*, 11 Barb. 624.

A sale by one partner to another is not such an alienation as will avoid the policy, even under an express condition that the policy shall become void. Angell on Ins. 197.

A mere change of interests or ownership among partners, where no stranger is introduced, and no addition made to the number of the insured — when there is no change in the condition or situation of the property or risk — a mere assignment of his interest, by one partner to the other, is obviously not within the principle or motives on which the condition is founded. *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297; S. C., 9 Am. Rep. 235.

Henry F. West assigned *his interest* in the policy. What was that interest? Not an aliquot part of the whole, for they were partners seized "*per my et per tout*" of the common stock of goods. *West v. Skip*, 1 Vesey, Sen. 242.

It was his share of the capital stock remaining after satisfying all partnership demands. When title to property, real or personal, is in a partnership, and is owned by it, it is clear that the conveyance by one partner of his interest conveys no greater interest than remains after all the demands against the firm are satisfied. If this firm had been insolvent when the policy was assigned — that, counting the insurance money as part of the assets, it could not pay its debts — then nothing was in fact assigned. For aught the court knows, this may have been so in this case.

The contracting parties were the insurers on the one hand, and H. F. West & Co. on the other. The language is clearly susceptible of the construction we have given. The one claimed by defendant seems strained and unnatural, and calculated to defeat rather than carry out the intention of the parties.

It does violence to all settled rules of construing contracts.

Conditions of this kind should not be extended by construction beyond the reason for their adoption, especially when, as in this case, it defeats the contract. The chief reason for requiring such a stipulation is to guard against the introduction of a stranger, who may not possess the fidelity of watchfulness required by the insurers. The change should increase the hazard.

In a case of a clause of this kind it was held that a sale or conveyance to the assured does not defeat the policy, though within the words of the proviso against a sale or transfer. The interest

West v. The Citizens' Insurance Company.

of the insured being thereby increased, the case did not fall within the reason and spirit of the proviso. May on Ins., § 275, and cases cited.

To say that H. F. West & Co. shall not assign the policy, or any interest therein, without consent, is a reasonable condition; but to say that the partners *inter sese* may not change their respective interests is not within the spirit and reason of the clause. The presumption is, that the company had faith in all the partners; the increase of plaintiff's interests, as we have seen, would not make them more watchful; the retiring partner no longer had a motive to endanger the insurer; no stranger was introduced; no one but those with whom the contract was made was left in control.

There being no adequate reason to support this enlarged construction, we cannot adopt it.

It is suggested that this clause was intended to secure the continuance of Henry F. West, in whom the company reposed special confidence, and without him the policy would not have been issued. In reply to this, we adopt the language of the New York Court of Appeals in *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, in a similar case:

"They testified their confidence in each of the assured, by issuing to them a policy, but did not choose to repose blind confidence in others who might succeed to the ownership. The only evidence of their confidence in either partner is in the fact that they contracted with all; and the theory is rather fanciful than sound, that they may have intended to conclude a bargain with rogues on the faith of a proviso that one honest man should be kept in the firm to watch them.

"It was intended by the proviso to protect the company from a continuing obligation to the assured, if the title and beneficial interest should pass to others they might not be equally willing to trust. Words should not be taken in their broadest import when they are equally appropriate in a sense limited to the object the parties had in view."

There is still another rule equally at variance with the defendant's claim. Stipulations in a contract providing for disabilities or forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. To seize on words introduced in the policy as a safeguard, and make them available to defeat the claim of the assured on the theory of

West v. The Citizens' Insurance Company.

a technical forfeiture, is in no possible view permissible. If the policy admits of such a construction, it is due to the dexterity of the draughtsman, and not to a meeting of the minds of the parties. 32 N. Y. 414.

We conclude, therefore, that the clause under consideration, in connection with the facts disclosed, does not avoid the policy, and that the plaintiffs are entitled to recover thereon.

Finally, the question arises—shall these plaintiffs recover the whole that H. F. West & Co. might have recovered, or only their individual shares? Does the sale by Henry F. West avoid the policy as to his undivided interest?

In *Hobbs & Henly v. Memphis Ins. Co.*, 1 Sneed, 444, a case much like this as to its facts, it was held, as to the share or interest of the retiring partner, the plaintiffs could not recover, but only for their own interest in the firm; while in *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 415, 416, where the same question arose, it was decided otherwise. The court there say: "There is no reason why the full measure of indemnity should be withheld from the plaintiffs, who were owners at the date of the insurance, and sole owners at the time of the loss." We concur in the reasoning of the court in that case, and its conclusions of law on this point.

These plaintiffs were parties to the contract; they continued to conduct the business contemplated by the policy; there was no substantial change material to the risk, and none within the meaning of the clause under consideration. The policy was intended to protect the interest of each and all; and its language, fairly construed, is in harmony with that intent.

We are aware that the conclusions we have reached are at variance with the greater number of reported cases, but we believe these conclusions rest on the firmer and more satisfactory ground of sound principles, and that they are more conducive to substantial justice—the aim and end of all law.

Judgment reversed, and cause remanded for further proceedings.

SCOTT, C. J., DAY, WHITMAN, and WRIGHT, JJ., concurred.

 Hayner v. Cowden.

HAYNER v. COWDEN.

(27 Ohio St. 292.)

Slander — imputing drunkenness to a clergyman. Damages — evidence of pecuniary ability.

Words, charging a clergyman with drunkenness, when spoken of and concerning him in his office or calling, are actionable *per se*.

In an action where punitive damages may be allowed, evidence of the defendant's pecuniary ability is admissible.

It is not error to refuse to charge the jury, that if the defendant without reasonable cause believed the charge to be true, they could not award exemplary damages, where there is evidence tending to show that he uttered the words in a wanton and reckless manner.

ACTION for slander, in charging the plaintiff, a clergyman, with drunkenness. The opinion states the case.

James Murray, J. T. Janvier, and H. G. Sellers, for plaintiff in error. I. A charge of drunkenness is not *per se* actionable. *Hollingsworth v. Shaw*, 19 Ohio St. 430; *Alfele v. Wright*, 17 id. 238; *Dial v. Holter*, 6 id. 228; *Buck v. Hersey*, 31 Me. 558; *O'Hanlon v. Myers*, 10 Rich. L. 128; Addison on Torts, 4.

II. That the defendant is a minister of the gospel does not change the rule. Ministers ought not to be regarded *in the eye of the law* as purer or holier than any other men nor entitled to protection in any greater degree. The law is no longer a respecter of persons; it no longer makes any distinction between classes or conditions of men; its guiding star now is "equality before the law for all."

III. If the words spoken are actionable *per se*, it can only be in a case where they are spoken in reference to the performance of his ministerial duties. *Lumby v. Allday*, 1 Cr. & J. 301; 1 Tyrw. 217; *Brayne v. Cooper*, 5 M. & W. 249; *Ayre v. Craven*, 2 Ad. & El. 2.

In this case the word "preacher" was evidently used for the sole purpose of identifying the person to whom reference was made.

IV. It must be averred that at the time the words were spoken plaintiff was a *paid* preacher; or in the receipt of *temporal* emoluments derived therefrom.

Hayner v. Cowden.

If the words were spoken of plaintiff as a minister, then this proposition is undeniably true. *Gallwey v. Maxwell*, 24 E. L. & E. 46; *Starr v. Gardner*, 6 Up. Can. Q. B. (O. S.) 512; *Hartley v. Herring*, 8 Term Rep. 130.

V. The court erred in refusing to charge that if defendant had no reasonable cause to believe the words to be true when he uttered them, yet if the jury found *that he did in fact believe them to be true*, then the case was not one for exemplary, but for compensatory damages merely.

The distinction between malice in law and malice in fact is well settled. Malice in law is that malice which the law presumes to exist from the *mere* doing of an unlawful act, while malice in fact is that which exists when there is superadded to the other an *evil intention* in the party doing the act.

The only cases in which exemplary or punitive damages may be given are those in which actual or express malice is shown. *Roberts v. Mason*, 10 Ohio St. 277; *Pitt v. Donovan*, 1 M. & S. 639; *Armstrong v. Pierson*, 8 Clarke, 29.

VI. The court erred in admitting evidence as to the defendant's wealth, for the purpose of aggravating damages. *Ware v. Cartledge*, 24 Ala. 622; *Palmer v. Haskins*, 28 Barb. 90; *Townsend on Slander*, § 391; 2 Greenl. Ev., § 249.

Conovers & Craighead, and *Morris & Son*, for defendant in error.

WRIGHT, J. The slander alleged in the petition consists in falsely charging plaintiff, a minister of the gospel, with drunkenness. It is also averred that the words were spoken of and concerning him in his ministerial profession and pastoral office. The demurrer admits all that is averred, and thus this question is raised: Are words which charge a minister of the gospel with drunkenness, when spoken of him in his profession or calling, actionable *per se*? We answer that they are. We understand the rule to be, that words spoken of a person, tending to injure him in his office, profession or trade, are thus actionable. 1 Starkie on Slander, 9; *Townsend on Libel and Slander*, § 182; 2 Addison on Torts, 957 (§ 2, ch. 17, ed. of 1876, of this book has a large collection of authorities on the subject), 1 Am. Lead. Cas. 102; *Foulger v. Newcomb*, L. R., 2 Exch. 327; *Demarest v. Haring*, 6 Cow. 76.

Hayner v. Cowden.

Calling a clergyman a drunkard was held actionable in *McMillan v. Birch*, 1 Binn. 176 ; *Chaddock v. Briggs*, 13 Mass. 248.

Such words are actionable because they tend to deprive him of the emoluments which pertain to his profession, and may prevent his obtaining employment. It is not, as counsel seems to suppose, that giving a clergyman this right of action is because his office is higher than that of his fellow men. It is a right which belongs to all who have professions or callings, and in this clergymen are not different from others.

This principle is entirely different from that upon which proceeded the cases *Hollingsworth v. Shaw*, 19 Ohio St. 430 ; *Dial v. Holter*, 6 id. 228 ; *Alfele v. Wright*, 17 id. 238. In all these the words imputed a criminal offense, and did not relate to profession or calling.

Upon the trial of the case it was insisted by defendant that the words were not spoken of the plaintiff in his character as a minister. The court fairly left this to the jury, and said if they were not so spoken, they would find for the defendant. The jury find this issue for the plaintiff, and in the face of that finding it is impossible for us, sitting as a court of error, to say that they were not spoken of the plaintiff in his character or capacity as a clergyman. If they were, as we have seen, they are actionable.

In the cases cited by defendant, *Lumly v. Allday*, 1 Tyrw. 217 ; *Brayne v. Cooper*, 5 M. & W. 249 ; *Ayre v. Craven*, 2 A. & E. 2 ; *Buck v. Hersey*, 31 Me. 558 ; *Redway v. Gray*, 31 Vt. 292 ; *Van Tapel v. Capron*, 1 Denio, 250, it was held that the words spoken did not touch the plaintiffs in their various trades or employments. But to charge a minister with drunkenness does have such an effect. Congregations would not employ clergymen with intemperate habits, and the development of such a vice would be cause for speedy removal from office. When the question is reduced to a mere matter of dollars and cents, the purity, the integrity, the uprightness of a minister's life is his capital in this world's business.

Against the objection made, plaintiff offered evidence of the wealth of the defendant, and in the charge the court said this evidence might be considered in connection with the question of exemplary damages. We see no error in the admission of the evidence, or the charge of the court upon the subject. That punitive or exemplary damages in a proper case may be given is not an open question in Ohio. In *Roberts v. Mason*, 10 Ohio St. 277 ; *Smith*

v. *I.*, *Ft. W. & C. R. R.*, 23 id. 10, the court allowed the jury to consider the wealth of defendant in connection with the question of punitive damages. If, then, punishment be an object of a verdict, a small sum would not be felt by a defendant of large wealth. The vengeance of the law would scarcely be appreciated, and he could afford to pay and slander still. There are cases which put the admission of the evidence upon this ground. *Alpin v. Morton*, 21 Ohio St. 536, intimates that the reason is to enable the jury to determine how much plaintiff has been injured. This case collects the authorities on both sides of the question, to which might be added *McBride v. McLaughlin*, 5 Watts, 375; *Waggoner v. Richmond*, Wright, 173; *Sexton v. Todd*, id. 320; 2 Greenl. Ev. 249; 1 Am. Lead. Cas. 199, note 6; *Horsley v. Brooks*, 20 Ia. 115; *Buckley v. Knapp*, 48 Mo. 153. We see no error in the admission of the evidence, or the charge of the court on the subject.

There are some other questions raised by counsel to which we briefly allude.

The defendant asked the court to charge the jury: "If they find that the words spoken by the defendant of and concerning the plaintiff were untrue, and that the defendant has not reasonable cause to believe them to be true; yet, if they are satisfied from the evidence that the defendant did believe them to be true, such state of facts would not warrant a verdict of punitive or exemplary damages, but for compensatory damages only," with which request the court refused to comply, but, on the contrary, charged the jury that such was not the law, to which the defendant then and there excepted.

We do not understand the law of slander to be that it is a defense that the slanderer believed his words to be true, when he had no grounds for so believing. Belief must have a foundation in something. Take away the foundation, and what can be left? The charge asked seems to us a solecism. Belief can only be claimed as a defense, or mitigation, where it is based upon such facts or reasons as would incline a reasonable person so to believe. Inasmuch as this charge was asked in reference to exemplary damages, and there was evidence tending to show that the words had been spoken under circumstances indicating wantonness and recklessness, the charge was properly refused.

It appears to be seriously argued that, in a minister of the gospel, a single act of intoxication is not a fault, and, therefore, a charge

Charlton v Miller.

of that kind cannot be injurious. We can hardly assent to this proposition. In a religious teacher one offense of the kind must be considered a grave departure from propriety and duty; and to say that the act has been committed is calculated to impair usefulness.

As to the question of excessive damages, the verdict was large; still we do not think defendant can complain, in view of all the circumstances of the case.

Judgment affirmed.

SCOTT, O. J., WHITMAN and JOHNSON, JJ., concurred.

DAY, J., dissented as to the second proposition of syllabus.

CHARLTON V. MILLER.

(27 Ohio St. 293.)

Will — devise to wife — effect of divorce.

J. B., being about to marry E. J., made his will as follows: "I give and bequeath to my intended wife, E. J., the sum of \$1,000, to be paid her within one year after my decease," and directed the residue of his property to be equally divided among his children. Soon after the marriage the wife abandoned her husband, who, for that reason, in due time procured a divorce. *Held*, that the will being positive and unconditional, E. J., after the death of the testator, without a revocation of the will, was entitled to the legacy according to the terms of the will.

ACTION for a legacy. The case was this: On the 13th of March, 1856, Joseph A. Blackburn and the plaintiff (whose name was then Elizabeth Jennings) were engaged to be married. On that day Blackburn made his will, giving to her \$1,000, payable one year after his decease, and designating her by her then name of Elizabeth Jennings. On the same day, after making the will, they were married. They lived together until the following November, when the wife abandoned her husband. In October, 1861, Blackburn obtained a divorce from his wife on the ground of willful absence. She applied for alimony in the divorce case, but it was refused by the court. Blackburn died January 17, 1866. His will was duly probated, and the defendant, Miller, was appointed administrator

with the will annexed. When the action was brought, more than a year after the decease of the testator, the administrator had settled the estate, leaving in his hands sufficient money to pay the bequest to the plaintiff, but this he refused to do. The plaintiff made no election in any court to take under the will other than the bringing of this action.

Each of the parties were over fifty years of age at the time of their marriage, and each had children by a former marriage. The will was committed to the custody of the clergyman who performed the marriage ceremony, who moved out of the State, and his residence was unknown to the testator. After the death of Blackburn, the plaintiff married William Charlton. The will reads as follows :

“ Know all men by these presents, that I, Joseph Armstrong Blackburn, of Perry township, Columbiana county, and State of Ohio, being of sound mind and memory, do make and publish this my last will and testament. 1. I give and bequeath to my intended wife, Elizabeth Jennings, the sum of \$1,000, to be paid her by my executor hereinafter mentioned, within one year after my decease. 2. After said sum has been deducted from my estate, I give and bequeath to the children of my first wife, to wit, Louisa J. Wilson, Sarah B. Smith, Mary J. Blackburn, Susan Blackburn, Rebecca A. Blackburn, John A. Blackburn, and Almeda C. Blackburn, an equal share of all the residue of my estate, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease. 3. But if any child or children should be born to me of my intended wife, Elizabeth Jennings, subsequent to my marriage to her, to such child or children I give and bequeath an equal share of my estate with the children of my first wife as above mentioned, after the \$1,000, bequeathed to my wife as above stated, has been taken out of my entire estate ; that is, the children of my first wife and the child or children born to me of Elizabeth Jennings after my marriage to her, shall be equal sharers of my entire estate whether real, personal, or mixed, after the sum before stated bequeathed to my wife, E. Jennings, has been deducted therefrom. 4. I do nominate and appoint Mr. George Burns, Esq., to be the executor of this my last will and testament. In testimony whereof,” etc.

The Court of Common Pleas held that the plaintiff was not entitled to the legacy claimed by her, and rendered judgment in favor

Charlton v. Miller.

of the defendant. Thereupon the plaintiff filed her petition in error in the District Court to reverse the judgment of the Common Pleas for error in its holding and judgment. In the District Court the case was reserved for decision in the Supreme Court.

Kennett & Ambler, for plaintiff in error.

J. T. Brooks and *Lucian L. Gilbert*, for defendant in error.

I. The bequest in question is to be regarded as a provision for a widow in the will of her husband, within the meaning of sections 43, 44 of the act relating to wills. S. & C. 1623, 1624.

The testator died January 17th, 1866, and the will is to be "construed by the laws then in force." *Hartshorne v. Rose*, 2 Disney, 15, 444.

The will must be construed in the light of the surrounding circumstances, and by the intention of testator. *Williams v. Veach*, 17 Ohio St. 180; *Worman v. Teagarden*, 2 id. 382; *Pruden v. Pruden*, 14 id. 256; *Palmer v. Yarrington*, 1 id. 259.

As to the effect of the divorce: The divorce severed the relationship of husband and wife, and the effect is the same as if she had died before the testator, while yet his wife. She is not his widow, and only as such could she take the legacy. She must, as his widow, elect to take it as a substitute for her dower, which she must release. She could not make the election. By her own wrongful act her right to dower and to make the election was defeated. Losing dower, she lost the right to ask that which was a substitute for it. The shadow fell with the substance. The legacy is to purchase her dower, and she has none to sell. No right to the legacy vested in her. It could only vest in her as the widow of the testator, which she is not. Even at common law, we claim, the same result would follow; the legacy being intended as in lieu of dower, it would only vest in her and take effect upon performance of the condition precedent — *i. e.*, the relinquishment of dower, a condition which she could not perform, having none to relinquish; and this leads us to our second point.

II. It is a legacy upon condition expressed in the will itself that she should become his wife, and widow, and as such relinquish her dower in his estate.

No set form of words are necessary to make a condition. The intention of the testator is the only test, and the same words may

make a condition, either precedent or subsequent, according to the nature of the thing and the intent of the testator.

We claim that the testator in this will was making a provision for the plaintiff as his widow, and in lieu of her dower, whether tested by the common law, or by the statute. By the common law because he made the will only to provide against the contingency of the plaintiff becoming his widow, and because his disposition of his entire estate to others, to be diminished only to the extent of the legacy to her, is manifestly inconsistent with her right to retain or take other portions of it for her dower.

If, then, he intended this legacy as a provision for her as his widow and in lieu of dower, it follows as a necessary part of the condition that she should become his wife and be such at his death; otherwise, she could not give the consideration required of her for the legacy. By her act and the act of the testator the full performance of the condition was rendered impossible, and the legacy never vested.

III. The divorce revoked the bequest.

1. By reason of the presumed intention of the testator.

An intention to revoke a devise is to be presumed from an act done by the testator inconsistent with it. *Walton v. Walton*, 7 J. C. 263.

2. By act of law. Tyler on Inf. & Cov. 293, 571; *Charruawd v. Charruawd*, 1 N. Y. Leg. Obs. 134; *Clark v. Lott*, 11 Ill. 144.

DAY, J. Neither the validity of the will nor its proper probate is disputed; nor is it claimed that it was ever revoked in any manner provided by the statute. But it is claimed that, properly construed, it never took effect in favor of the plaintiff, or was constructively revoked by the divorce procured by the testator. The principal question, then, is: What is the true meaning of the will as written, when read in the light of the circumstances that surrounded the testator when it was made?

Undoubtedly, the contemplated marriage of the parties, and a desire to make a provision for the plaintiff as his wife, were prompting causes of the will; but whether these were the only motives of the testator we cannot tell. If so, he might easily have made the bequest upon the conditions that the legatee became his wife and survived him as his widow; but he chose to leave these conditions, if contemplated by him at all, to be inferred only from words of

Charlton v. Miller.

description that he gave to his legatee as being his "wife" or "intended wife." The bequest is made in absolute and unconditional terms, so far as expressed in the language of the will, and cannot be evaded or overcome by mere argumentative inferences drawn from words of the will not used for any such purpose. Had the testator died before the marriage contemplated, the right of the plaintiff to the bequest cannot be doubted, for the marriage was not made a condition precedent to the legacy. Nor is the case different if, after marriage, she ceases to be his wife, for the legacy is not conditioned upon her survivorship as his widow. If, then, her right to the legacy does not depend upon the marriage, it cannot be lost by the divorce, for she can lose no more by the divorce than she gained by the marriage.

By the divorce, under the provisions of the statute, she lost her right of dower; and, being divorced, she was not the testator's widow at his decease. Not being entitled to dower, and not being the testator's widow, she had no right of election, as provided by statute for widows who are entitled to either dower or a provision in a will in lieu of dower, but was left alone to whatever rights she had under the will. The procuring of a divorce by the testator does not necessarily imply a revocation of the will, for it is entirely consistent with an intent to annul her right of dower only, and her consequent right of election, thus leaving her to take under the absolute and unconditional provisions of the will. The probable correctness of this view is strengthened by the fact that while he might easily have expressly revoked the will, though not in his possession, and wherever it might be, either before or after the divorce, for some reason, satisfactory to himself, it was never done. To defeat the bequest, we must then not only add to the will conditions that are neither expressed nor necessarily implied therein, but must rebut the presumption against any intended revocation of the will arising from the testator's acquiescence therein for nearly five years after he was abandoned by his wife before he obtained a divorce, and more than four years after the divorce before his death. It follows that the judgment of the Court of Common Pleas must be reversed, and the cause will be remanded for further proceedings.

Judgment accordingly.

SCOTT, C. J., WRIGHT, JOHNSON and ASHBURN, JJ., concurred.

FULLER V. STEIGLITZ.

(27 Ohio St. 355)

Assignment — set-off — conflict of laws — inter-state comity.

The assignment of a non-negotiable demand, arising on contract, before due, defeats a set-off by the debtor of an independent cross-demand, on which no right of action had accrued at the time of the assignment.

An assignment of personal property and choses in action by an insolvent debtor for the benefit of creditors in conformity to the laws of the State of New York, where such debtor resided and did business, operates to transfer the right of action to recover said choses in action to the assignee, and he may maintain an action as such assignee in the courts of this State, to collect the same, although said assignment, as authorized by the laws of New York, gives preferences to certain of the creditors.

In case of such an assignment of choses in action, the law of the domicile of the assignor controls and determines what is a sufficient transfer to authorize the assignee to collect the same.

The principles of comity between States will allow such assignee to maintain an action, in the courts of this State, against one of its citizens, to collect the same, notwithstanding such preferences, in the absence of any set-off or other defense to such action, or of any lien or charge against said claim under the laws of Ohio by the debtor.

ACTION on an account. The opinion states the case.

J. E. Ingersoll, for plaintiff in error. The doctrine of comity does not require a sovereignty to aid in enforcing a contract made without its jurisdiction, which contravenes its own public policy, or is injurious to the interests and rights of its own subject. Story on Conf. of Law, §§ 244, 259; 2 Kent's Com. 455; 2 Pars. on Cont. 82; *Ingraham v. Geyer*, 13 Mass. 146; *Guillander v. Howell*, 35 N. Y. 65.

As to set-off in this case, see 35 N. Y., cited above; *La Chevelier v. Lynch*, Doug. 170; 40 N. H. 237; 5 Cranch, 298; *Follett v. Buyer*, 4 Ohio St. 591; Waterman on Set-off, §§ 395, 398.

The policy of the law of Ohio is averse to assignments giving preferences. 1 S. & O. 712, § 16; 2 id. 952, § 26; id. 981, § 99.

[This case being decisive of *Benedict v. Steiglitz*, the argument of counsel in that case is given here.]

Fuller v. Steiglitz.

Estep & Burke and *Prentiss & Vorce*, for plaintiffs in error. On the question of set-off, the court is referred to Burr. on Assign 438, 439; 3 Kent's Com. 700, note *b*; *Morgan v. Bank of N. A.*, 8 Serg. & R. 73; *Stewart v. Anderson*, 6 Cranch, 203; *Aldrich v. Campbell*, 4 Gray, 284; *Bigelow v. Folger*, 2 Metc. 255; *Myers v. Davis*, 22 N. Y. 493; *Guillander v. Howell*, 35 N. Y. 657; *Dorsheimer v. Bucher*, 7 Serg. & R. 9.

R. P. Ranney, for defendant in error: On the question of set-off, cited 37 N. Y. 396; *Williams v. Brown*, 2 Keyes, 486; 1 Handy, 338; 5 Ohio St. 59; and claimed that the laws of New York govern the case. Story on Confl. of Law, § 558.

JOHNSON, J. In the Common Pleas, Steiglitz, assignee of J. Smal, brought an action on an account of \$968.75, for goods sold by Smal October 9 and November 3, 1866, on a credit of six months. Smal was a resident of and doing business in the State of New York, and, becoming insolvent, made an assignment of certain property, including this account, on the 11th of December, 1866, in trust for creditors, giving certain preferences, as allowed by the laws of that State.

The defendant, a citizen of Ohio, makes no formal objection to the plaintiff's capacity to sue as such assignee. He makes no defense to a recovery of the amount claimed, but seeks to have set off a cross-demand which he holds. This set-off is placed on two separate grounds.

1. He says that, after contracting this debt to Smal, he purchased, in due course of business, a promissory note on Smal, which became due December 19, 1866, for \$1,806; that owing to the preferences given in the assignment, the estate will not pay exceeding ten per cent to the general creditors; and he asks that so much of this note as is necessary be applied to cancel the plaintiff's demand.

2. If this cannot be done, he then, for the reason stated, asks for a reference to a master to inquire and state an account of the amount, *pro rata*, that Smal's estate will pay, if settled up according to the principles of equality among creditors, and to have his *pro rata* share, as a creditor holding said note, offset against the plaintiff's action.

The court charged that neither of said defenses constituted a valid cross-demand, and gave judgment for plaintiff, which was affirmed by the District Court.

This presents two questions :

1. As neither the account sued on nor the note set up was due, at the time of the assignment to plaintiff, could the defendant's prospective cause of action be defeated as a set-off by the assignment?

2. As the assignment preferred creditors, but was valid by the law of New York, where made, will the courts of Ohio apply the principles of comity, and allow a recovery of the claim by the assignee under the circumstances stated in defendant's answer?

Neither cause of action was due at the date of the transfer. There is no connection between the two claims. They did not grow out of the same transaction, nor is the note in any way connected with the account. It is not a case where, by mutual dealings, they were each the debtor of the other, a case of mutual accounts between parties dealing with each other.

In such case there are strong equitable considerations for applying the principles of compensation.

It is not claimed that the assignment was tainted with bad faith, or that there was any purpose to defraud the defendant or defeat his cross-demand.

The plaintiff, as assignee for creditors, could acquire no greater title than Smal had when he made the assignment. The account being a non-negotiable thing in action passed subject to all the defenses existing against it at that time against the assignor.

At common law such a chose in action could not be assigned so as to allow the assignee to sue in his own name. It must be in the name of the assignor for the use of the assignee. Whatever equities existed, whether by way of defeating the cause of action, or by counter-demand, could be interposed.

By section 25 of the Code of Civil Procedure, the real party in interest, in this instance the assignee, must sue in his own name as trustee for the creditors.

In order that this change in the plaintiff in such cases should not cut off existing rights of defense, the 26th section provides that "in case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed."

This section preserves to the debtor the same rights of defense as under the old practice.

No new rights were acquired by the debtor, nor were any additional burdens imposed on the right to transfer such demands.

Fuller v. Steiglitz.

These provisions of the Code recognized the existing law, and adapted the new system of pleading to it. *Myers v. Davis*, 22 N. Y. 489 ; *Martin v. Kunsmüller*, 37 id. 396 ; Pomeroy on Remedies, § 4.

The set-off allowed by the Code, instead of being limited, as formerly, to liquidated demands, extends to any cause of action founded on contract or ascertained by the decision of the court. Whether the words "now allowed," in section 26, limits the set-off to the former, or includes the latter, does not arise in this case, as both are liquidated demands.

The plaintiff in error relies on the provisions of section 99 of the Code, which provides, "when cross-demands have existed under such circumstances, that if one had brought an action against the other, a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, as far as they equal each other."

If the circumstances were such that, had Smal brought an action against Fuller, his set-off could have been set up, then Smal could not deprive Fuller of the benefit of his set-off by this assignment. But the circumstances were not such. Before the assignment Smal could bring no action, for no right of action had accrued. Fuller had no cause of action that could not be set up, because none had accrued.

On the 11th of December, 1866, neither had any demand within the meaning of section 99, that was not subject to be defeated by assignment or death.

It is well settled in such case, the death of one of the parties defeats after-accruing cross-demands.

Assignment or death are mentioned together, and the circumstances that will defeat the set-off in the one case will do so in the other. *Granger v. Granger*, 6 Ohio, 35 ; *McDonald v. Black*, 20 id. 196.

The same rule applies in cases of insolvency as in case of death. *Waterman on Set-off*, § 19 ; *Finnell v. Nesbitt*, 16 B. Monr. 351.

We wish to limit these remarks to the case now before us, which is purely an independent cross-demand.

As to defenses which go to defeat the plaintiff's right to recover on his cause of action, such as want of consideration, payment and the like, section 99 has nothing to do.

It is said that set-off is the creature of statute law, and was probably borrowed from the doctrine of compensation of the civil law. Compensation in case of mutual dealings was founded on a natural equity which permitted the reciprocal acquittal of mutual debts. The statutes of the different States differ as to the exact character of the set-off, and when it may be allowed in cases of assignment, and the bankrupt laws differ much from the general laws.

By 2 Geo. II, ch. 22, § 13, a set-off of mutual debts was allowed. Under this statute, a set-off was called a "cross debt." Chitty on Cont. 824.

The set-off allowed in Ohio, prior to the Code, was defined by the act of February 19, 1824, and was, like the English statute, limited to liquidated demands, or such as might be liquidated by computation.

Then, as well as now, it is clearly distinguishable from payment, recoupment, counter-claim, or any defense which went to defeat plaintiff's right to recover.

It is an independent right of action, which is set up to cancel in whole or in part an admitted demand. Waterman on Set-off, ch. 1.

"Until a demand becomes due the set-off or counter-claim may be defeated by the assignment by the opposite party of his claim, though the latter be insolvent, and his demand has not been payable when assigned." Waterman on Set-off, § 99.

Myers v. Davis, 22 N. Y. 489, was a case of an assignment similar to the one at bar. It is there said: "The actual rights of the parties were not changed by the alteration of the practice allowing the real party in interest to sue. The defendant is entitled to the same defense as under the former practice, and the change effected by the Code is simply as to the form in which the action is brought. The defendant's difficulty is, that at the time of the assignment to the plaintiff, in this case, the demand of the defendant had not matured, so as to be the subject of a set-off, and when it had so matured, the demand against him had passed into the hands of the plaintiff, against whom he had no claim."

In *Martin v. Kunzmüller*, 37 N. Y. 396, the same question was considered. It was said a set-off must be *in presenti* at the time of the assignment; that if at that time the defendant had no present demand or debt due and payable, he had no offset; that he cannot set up a debt due by him to the assignor — a debt of his matured afterward." In *Roberts v. Carter*, 38 N. Y. 107, in a like case, it was said "the assignment prevented any right of set-off accruing."

Fuller v. Steiglitz.

Pomeroy on Remedies, 198 *et seq.* See, also, *Beckwith v. Union Bank*, 9 N. Y. 212; *Williams v. Brown*, 2 Keyes, 486; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Ogden v. Prentice*, 33 Barb. 160; *Wells v. Stewart*, 3 Barb. 40; *Adams v. Rodarmel*, 19 Ind. 339.

It is said in argument that these decisions are made under the New York statute of set-off, which is materially different from ours.

We have compared section 99 with the New York statute on the same point. It reads: "If the demand be such as might have been set off against such plaintiff or such assignee while the contract belonged to him."

The meaning of this is the same as section 99, so far as the effect of an assignment on a set-off is concerned.

In each the *test* of whether the debtor preserves his set-off depends on whether he could have set it up before the assignment — that is, while the contract belonged to the assignor.

Whether we regard this as a question to be determined by the statutes of New York or Ohio is not material, as they are substantially the same.

We conclude, therefore, that Smal, by the assignment before the maturity of either claim, prevented a set-off from accruing. The converse of this holding might work a more injurious preference than is complained of.

A number of cases have been cited to the effect that if the set-off accrue before suit brought, it cannot be thus defeated. In New Hampshire the statute is: "If there are mutual debts between the plaintiff and defendant *at the time of the commencement of the action*, one debt may be set off against the other." The phraseology of different statutes gives rise to this diversity in the cases.

Again, many cases arising under the bankrupt laws adopt a broader rule.

The court, in 4 Ohio St. 593, speaking of these decisions, say: "They have very little if any application to this case. These statutes have generally permitted a set-off of *mutual credits*, whether due or not, and have, therefore, administered a much broader equity than the ordinary law of set-off." See notes to *Rose v. Hart*, 2 Smith's Lead. Cases, 293.

This subject is fully reviewed, and numerous authorities cited, in the recent valuable treatise on the subject of Remedies and Remedial Rights, by Prof. Pomeroy, where the conclusion we have reached is fully supported.

II. The second defense is in the nature of an equitable set-off, based on the ground that it is against the public policy of the State to enforce an assignment which gives preferences, where the general creditors will be deprived of a large share of their claims.

The defendant, as such a creditor, asks that the principles of the Ohio law on the subject be applied, and to that end prays the court to ascertain what the estate would pay *pro rata*, and have the amount that he would thus be entitled to offset. He claims that the principles of comity between States does not require our courts to enforce the New York assignment when it injures a citizen of our own State.

If we are correct in our conclusions on the first point, the defendant has no valid set-off in this action, and no legal or equitable lien or charge against this account. It is not, therefore, a case where he as a citizen of Ohio is claiming *rights under our laws* as against claims arising under New York laws.

By the New York law the plaintiff's right of recovery is complete, and by the Ohio law there is no set-off.

If the plaintiff was acting under the insolvent law of this State, the defendant could not have his set-off, and a court of equity would not grant him the relief he asks on such grounds, and thus interfere with the Probate Court in the administration of the estate.

The fact that he is a citizen of Ohio creates in his behalf no equities in fact. As such citizen, he is entitled to the authority of its courts *in support of his rights*, founded upon its laws. A court of equity would not interfere with an insolvent court of our own State, unless the usual ground for equitable relief was made. The defendant has no equities in this case that is not common to all general creditors, whether citizens of Ohio or not.

An assignment preferring credits was valid at common law. *Lawrence et al. v. Davis*, 3 McLean, 177.

The general rule of inter-state comity is that the law of the domicile of the owner of personal property and choses in action controls in their disposition by sale, devise or assignment. *Bank of Augusta v. Earle*, 13 Pet. 519 ; *Sortwell v. Jewett* 9 Ohio, 180 , Story's Conflict of Laws, §§ 379-384; *Dundas v. Bowler*, 3 McLean, 397.

In *Sortwell v. Jewett*, it is said, "that as between citizens of the United States there is neither justice nor expediency in a rule of

Fuller v. Steiglitz.

policy that a State should prefer the rights of its own citizens, and discriminate against citizens of other States. The natural right of the owner to dispose of his own property depends on no locality, and is subject to no restrictions, except in conformity to law. A compliance with these laws should avail equally the stranger as the citizen." That was a case of an assignment in New York, giving preferences where the land assigned lying in Ohio had been seized in attachment after the assignment. The court held the Ohio attachment was subordinate to the rights of the assignee.

On the same point the Supreme Court of the United States say : "The intimate union of these States as members of the same great political family — the deep and vital interests which bind them so closely together — should lead us to presume a greater degree of comity and friendship and kindness toward each other than we should be authorized to presume between foreign nations."

State insolvent laws of other States so far constitute a part of the contract, that a discharge under them, where the contract was made and to be performed, is a bar, in Ohio, to any further action. *Bank of Utica v. Card*, 7 Ohio, pt. 2, p. 170.

Interest laws of other States, though in conflict with ours, are enforced — the rule being that, if the contract was valid where made and to be performed, it would be sustained in Ohio. 1 Ohio St. 253.

So, a devise in Jamaica of personalty in Ohio is governed by the laws of that island. It is said : "As personal property has no locality, but accompanies the owner, the consequence necessarily is that the voluntary disposition, as well as distribution of it must depend exclusively on the law of the domicile." *McCune v. House*, 8 Ohio, 144 ; *Dundas v. Bowler*, 3 McLean, 397 ; *Kanaga v. Taylor*, 7 Ohio St. 134.

In *Oliver v. Townes*, 14 Martin (La.), 93, a leading case, an exception to this general rule is stated. It is there laid down "that when the laws of a foreign State clash with and interfere with *the rights of citizens* of the country where the parties to the contract seek to enforce it, as one or the other must give way, those prevailing where the relief is sought must have the preference."

This exception, though not sanctioned by any case of authority in this State, is strongly supported both by reason and authority. *Guillander v. Howell*, 35 N. Y. 657 ; *Ingraham v. Geyer*, 13 Mass. 146 ; Story's Conflict of Laws, § 388.

In all of these cases, there is a conflict of rights under the laws of the two States. Each party is asserting claims founded upon conflicting laws, when one or the other must give way. *Oliver v. Townes* was a conflict between a vendee of a vessel lying at New Orleans, under a sale made in Virginia, and valid there, and an attaching creditor in Louisiana, where the sale was invalid. So, also, was the case of *Ingraham v. Geyer*. In that case, PARKER, J., says: "A citizen who has *actually seized the debt* by attachment, before it was paid to the assignee, would be protected in his *lien*. To give effect to the assignment, so as to *intercept the lien* obtained by the creditor under the laws of our own State, when, by the effect of that assignment, he would be deprived of all opportunity of participating with creditors in Pennsylvania in the proceeds of the debtor's effects, would be undue partiality toward foreign creditors."

In *Gunlaudet v. Hall*, 35 N. Y. 657, a distinction is drawn between personal property actually located out of New York and choses in action owing by citizens of other States. The former are held subject of seizure in attachment, so as to defeat the New York assignment; but the latter, having no actual situs, other than the domicile of the owner, cannot be taken from the assignee by the laws of another State. Whether this distinction is sound, it is now immaterial to inquire.

In none of these cases, constituting what is called the *exception* to the general rule, have the courts refused to apply the rules of comity, unless there was an *actual conflict* of rights growing out of a conflict of laws of the two States.

In this case, there is no such conflict between the plaintiff's rights, founded on the New York law, and the defendant's, founded on Ohio law.

If, by attachment or otherwise, this account had been seized, and a lien or charge established against the same under Ohio laws, by a citizen creditor of Smal, the question decided in 13 Mass. 146, would have been presented here for decision.

As it stands, the defendant having no valid claim to reach and appropriate this account to the payment of his claim against Smal, he must be governed by the general rules of comity in such cases.

The judgment is, therefore, affirmed.

Judgment affirmed.

SCOTT, C. J., DAY, WRIGHT, and ASHBURN, JJ., concurred.

Goodale v. Fennell.

GOODALE V. FENNELL.

(27 Ohio St. 426.)

Constitutional law — impairing obligation of contracts. Municipal corporations — betterments — taxation for.

The power vested in the general assembly under article 18, section 6 of the Constitution of Ohio, to restrict the powers of taxation and assessment by municipal corporations, is subject to the limitations imposed by article 1, section 10 of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts," and of article 2, section 28, of the Constitution of Ohio, which declares that the general assembly shall pass no retroactive law or laws impairing the obligations of contracts.

Where a statute authorized a municipal corporation to improve its streets, and make assessments on abutting lots to pay the cost thereof, and it has, after taking the necessary steps, required by law and the ordinances governing in such cases, made a contract with an individual to do the work for a stipulated price, and binding itself to pay such price in assessments under such statute, which the contractor agrees to accept in full payment, the obligation of the corporation to pay in the manner stipulated cannot be impaired by a subsequent amendment of such statute, which takes away the power to make an assessment equal to the amount agreed to be paid.

A subsequent statute which repeals or restricts the power of assessment so previously given, is, in so far as it affects the obligations of contracts existing at the time, a statute impairing the obligation of such contract.

Unless adequate provision is made to enable the corporation to perform its existing contract obligations, such subsequent statute will be construed as prospective in its operations, and not applicable to such contracts; and it will be the duty of the corporation to be governed by the statute in force when the contract was made.

ACTION to recover an assessment. The opinion states the case.

Caldwell, Coppock & Caldwell and J. G. & H. Douglass, for plaintiffs in error.

Henry M. Cist, for defendant in error. The legislature had no power to change the limit of the assessment, so far as these cases are concerned, during the progress of the work. *Van Hoffman v. City of Quincy*, 4 Wall. 535, 553; *Planters' Bank v. Sharp*, 6 How. 301.

JOHNSON, J. The original action was brought by defendants in error, to recover of defendant, as an abutting lot owner, an assessment of \$386.59 for improving Oregon street in the city of Cincinnati.

The answer denies the validity of the assessment, on the ground that it was made at a higher rate than the limit fixed by law governing assessments by municipal corporations for such purposes.

It is admitted that all the proceedings are regular, the contract legally made with plaintiffs below, the work well and properly done, and accepted by the city, and that all the necessary steps have been taken by the city, in conformity to the contract and the law in force when it was made, to create a legal and binding charge on the abutting property to pay the cost of the improvement. The lot of defendant was worth more than double the assessment, but the value of the same, *as assessed for taxation*, was only \$260.

The ordinance to grade and improve Oregon street was passed November 6, 1868.

In pursuance thereof the contract with plaintiffs to do the work was made December 23, 1868.

The ordinance to pay for the improvement by the assessments was passed November 18, 1870.

The law of the State in force *at the time the contract was made*, providing for the improvement of streets and limiting the taxes to be assessed by municipal corporations on lot owners therefor, was the act of February 21, 1866 (S. & S. 803), the proviso of which reads as follows: "That in no case shall the tax levied and assessed upon any lot or lands for any improvement authorized by this section amount to more than *fifty per centum of the value of said lot or land, to be estimated after the improvement has been made*, and all the cost of said improvement, exceeding the said per centum, that would otherwise be chargeable on said lot or land, shall be paid by the municipal corporation out of its general revenue."

The Municipal Code, § 543, contains the same provision, and in the repealing clauses of that Code the act of February 21, 1866, is repealed. This Code was passed May 7, 1869.

On April 18, 1870, § 543 was amended (Ohio L., vol. 67, p. 80) as follows: "In no case shall the tax or assessment specially levied and assessed upon any lot or land for any improvement amount to more than *twenty-five per centum of the value of such lot or land as*

Goodale v. Fennell.

assessed for taxation, the cost exceeding such per centum, that would otherwise be chargeable on such lot or land, shall be paid by the corporation out of its general revenue."

This statute was in force November 18, 1870, when the ordinance making the assessment to pay for the work was passed and took effect, and it is admitted that if it controls, then the Superior Court erred in holding the assessment valid, but if the law in force *at the time the contract was made* and the work undertaken controls, then there is no error in the judgment.

It is claimed by plaintiff in error, that the law of April 18, 1870, in force when the assessment ordinance was passed, limits the amount to twenty-five per cent on the taxable value of his lot, and that there is no saving clause in that act which repeals the original section 543 (which in turn had repealed the act of February 21, 1866), which saved the city the right to levy the higher rate allowed when the contract was made in payment of existing contracts.

On the other hand, the defendant in error claims: That sections 725 and 729 of the Code saved to the city the right to make the assessment to complete this contract, but if they do not, then the act of 1870, so far as it affected or took away the power of the city to perform its contract with the contractors, was unconstitutional, as impairing the obligation of a contract.

Under the act of 1870 this lot was liable only for \$65 assessment.

Under the act in force when the contract was made the assessment of \$386.59 was valid. The difference to plaintiffs below is \$221.59 on this lot, which they will lose if the act of 1870 governs, and the city is not bound to make good the deficiency out of the general revenue.

The city, by its contract with Fennell & McGuire, had bound itself to pay them, at certain rates per quantity, for one thousand five hundred and forty-seven feet of street to be improved according to plans and specifications, and under the direction of the city engineer, "in consideration of the faithful and entire performance" of the contract by the plaintiff.

In providing the mode of payment is the following clause:

"But it is expressly and furthermore covenanted and stipulated by and between the parties hereto, that compensation and payment for all work done and materials furnished under the contract shall be made as specified in the ordinance of the city council of the city

of Cincinnati, passed the twelfth day of June, in the year eighteen hundred and fifty, entitled 'An ordinance to regulate the collection of special taxes for the improvement of streets, lanes, alleys * * * and to repeal a certain ordinance on that subject,' *and not otherwise. And the city of Cincinnati shall not in any event be liable to pay for any part of said work or of the material used for the same, except such as may properly be chargeable upon city property bounding or abutting the said street, agreeably to the provisions of the ordinance aforesaid.*"

In performance of its contract to pay as above stipulated, the city passed an ordinance November 18, 1870, "to pay the cost and expenses of improving Oregon street," the second section of which provides "that the owners of the several lots of land, upon each front foot of which the sum aforesaid is assessed, shall pay the amounts of money by them severally due in that behalf to Fennell & Maguire."

From the foregoing statement of the case, it appears:

1. That this contract binds the contractors to accept and receive in full payment for their work the assessments made on the lots or land bounding or abutting on the street, which was to be equal in aggregate amount to the cost of the improvement, *in no event was the city to be liable for any part of the cost, except as a property owner.* The contractors thus surrendered all claim on the general revenue for any excess of cost over the assessment.

The assessment ordinance was passed in strict accordance with the ordinance to grade and pave, and the contract; and the rate on this lot did not exceed fifty per cent of the value of the lot, as permitted by the act of 1866, and the original section 543 of the Municipal Code.

By the express terms of the original ordinance to grade and pave, passed before the contract was made, "the cost and expense was to be ascertained and assessed according to the provisions of the acts of the legislature and other ordinances of the city on the subject of special taxes."

The contract to surrender all claims on the city or its general revenues was in consideration of receiving an assessment equal to the cost of the improvement, not exceeding fifty per cent on the value of the property after improved -- the limit of such an assessment at that time.

The facts shown by the record are conclusive that an assessment

Goodale v. Fennell.

of twenty-five cents on the assessed value of this lot is 221 — less than the contractors were entitled to by the law in force when they made the contract and performed most of the work. It is not supposable that they would have covenanted to surrender all claims against the city, except on condition that they would receive assessments that would be valid, equal to the cost of the improvement.

They must be presumed to have known the law fixing the power of the city to pay in an assessment, and to have contracted with express reference thereto. They were bound to know the facts as to the value of the lots, the cost of the work, the language of the contract, and to have considered the deficiency, if any, that would exist under the law as it then stood. *Welker v. Toledo*, 18 Ohio St. 452.

Having surrendered all claim for any such deficiency, they have no claim on the general revenue. *Creighton v. Toledo*, 18 Ohio St. 447 ; *Welker v. Toledo*, id. 452.

It follows that if the act of 1870 controls, the contractors must lose the difference between the amounts that would be raised under the law in force when the contract was made and that after it was completed. It is apparent that this is a material diminution of the amount the contractors were entitled to receive.

It is claimed that, by the saving clauses of the Municipal Code — sections 725 and 729 — the right of the city to make the higher levy, under the repealed act, is saved to the city, so far as to enable it to perform existing contracts.

It is not clear that this is so. We are, therefore, compelled to inquire whether the act of 1870, so far as it operates to take away from the city the power to comply with its existing contracts, is not unconstitutional, as impairing the obligation of a contract.

The obligation of a contract consists in its binding force on the party who made it. This depends on the laws in force when it is made.

These are necessarily referred to in all contracts as forming part of them, as the measure of the obligation to perform them, and as creating the right acquired by the other party to compel performance.

When the contract is once made, the law then in force defines the duties and rights of the parties under it. Any change which impairs the rights of either party, or amounts to a denial or ob-

struction of the rights accruing by a contract, is obnoxious to this constitutional provision. *McCracken v. Hayward*, 2 How. 608; *Ogden v. Saunders*, 12 Wheat. 213, 302.

In the latter case, THOMPSON, J., says: The obligation of the contract consists in the power and efficacy of the law which applies to and enforces performance of the contract, or the payment of an equivalent of a non-performance. The obligation does not inhere and subsist in the contract, *proprio vigore*, but in the law applicable to the contract." Story on Const., § 1,380; Cooley's Const. Law, 285; Sedg. on Stat. and Const. Law, 603-610.

In *Curran v. The State of Arkansas*, 15 How. (U. S.) 304, Mr. Justice CURTIS said: "The obligation of a contract, in the sense in which the words are used in the Constitution, is the duty of performing it, *which is recognized and enforced by the laws. And if the law be so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.*"

One of the tests that a contract has been impaired is that its value by legislation has been diminished.

It is not a question of degree, but of encroaching in any respect on its obligation — dispensing with any part of its force. *Planters' Bank v. Sharp*, 6 How. 301; *Green v. Biddle*, 8 Wheat. 1.

A case quite analogous to this was before the Supreme Court of the United States (*Von Hoffman v. City of Quincy*, 4 Wall. 535), where it was held that where a statute authorized a municipal corporation to issue bonds and levy a tax to pay them, and persons have bought and paid value for the bonds, the power thus given of taxation is a contract within the meaning of the Constitution, and cannot be withdrawn until the contract is satisfied. The State and corporation, in such case, are equally bound, and a subsequent statute, which repeals or restricts the power of taxation so previously given, is, in so far as it affects bonds bought and held under these circumstances, a nullity. In such a case, it is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed, and, if it does not perform that duty, mandamus will lie to compel it.

The court says: "When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest as it accrued from time to time on the entire debt.

Goodale v. Fennell.

“But for the act of February 14, 1863, there would be no difficulty in enforcing them.

“The amount permitted to be collected by that act will be insufficient. * * * To the extent of the deficiency the obligation of the contract will be impaired.”

In *State ex rel. Soutter v. City of Madison*, 15 Wis. 30, it was held, “that where the charter of a city at the time of the issue and sale of bonds made it the duty of the common council * * * to levy and collect the amount like other city or ward charges, * * * a subsequent act of the legislature, prohibiting the city from levying such a tax * * * for interest on said bonds, would deprive the creditor of the only efficient means of collecting his debt, and would be repugnant to the Constitution.” To same effect is *Smith v. City of Appleton*, 19 Wis. 468.

In this case municipal bonds were issued and disposed of under a law which prohibited the city from thereafter issuing bonds for any other purpose than to pay the bonded debt of the city. It is said that this provision was obviously introduced to induce the creditors to surrender the old bonds and accept the new. “When accepted by the creditors and the city, and new bonds issued, it constituted a most material element of the new contract. It entered into and became a part of it, and as such is not the subject of legislative repeal or amendment, so as to impair the right or diminish the security of the creditors, without their consent.”

In the case before us, the law in force at the time the city obligated itself to make an assessment equal to the contract price of the work, created the obligation of this contract. The act of 1870 impaired that obligation by depriving the city of the power to perform, without any provision to make good to the contractors the difference.

The city was not bound to make it good out of the general fund, and could not be compelled to do so, under the authority of the cases cited from 18 Ohio St.

Its obligation was to pay by an assessment, and in no other way. It could be made liable in no other way without the assent of both parties.

Under section 6 of article 13 of the Constitution of the State, “the general assembly may provide for the organization of cities and incorporated villages by general laws, and restrict their powers

Fosdick v. Greene.

of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power."

This power, however, is subject to the limitation imposed by the Constitution of the United States, article 1, section 10, that "no State shall pass any law impairing the obligation of contracts;" and, by article 11, section 28, of the Constitution of Ohio, which declares that "the general assembly shall have no power to pass retroactive laws or laws impairing the obligations of contracts."

When the legislature has invested the corporation with the power to improve streets, and raise the money to pay the costs of such improvement by an assessment, and persons have, on the faith of this power and the stipulations of the corporation, performed the contract, and the contractor has become entitled to the consideration, there is a contract obligation to pay, valid in all respects, that may be enforced. Such a contract is as free from legislative control as one between individuals. It is wisely limited by the constitutional provisions referred to.

While it is important that such organizations should at all times be subject to legislative control as to taxation and assessment, yet, in view of the influences operating to control their legislation and local policy, and too often the absence of that sense of binding obligation which is generally felt by individuals to perform their obligations, it becomes of the highest importance, as a protection to the citizen, to maintain the contract obligations of municipal corporations, unimpaired by legislative or local action, equally with those of individuals.

Judgment of Superior Court affirmed.

SCOTT, C. J., DAY, WRIGHT and ASHBURN, JJ., concurred.

FOSDICK v. GREENE.

(37 Ohio St 434.)

Bailment — of stocks — action — demand — damages.

G., owning shares of the Marietta and Cincinnati Railroad stock, in 1856-7, transferred the same to F., who gave to G. written obligations for its return, substantially as follows: "Borrowed of William Greene one hundred and nine shares of Marietta and Cincinnati Railroad stock, drawing interest at

Fosdick v. Greene

eight per cent, to be returned on demand." Afterward, the Marietta and Cincinnati Railroad Company, having become hopelessly insolvent, in 1860, a mortgage on the road was foreclosed; all its property and rights sold; sale confirmed and deed made to the purchaser; and afterward all the property, rights and franchises of the Marietta and Cincinnati Railroad Company, having been conveyed to a new corporation, the old corporation ceased to exist in fact, and its stock, from that time on, ceased to have a legal existence, and had no value. *Held*, the transaction between G. and F was in the nature of a *mutuum*, and payment in discharge of the loan could be made by a return of an equal number of shares of stock of the Marietta and Cincinnati Railroad Company without regard to its market value.

When, by the terms of the contract, the borrowed stock is to be returned on demand, it is meant that an equal number of shares of stock of the same company shall be returned, and no cause of action accrues to G until demand is made or waived, or fact exists that avoids the necessity for demand. The financial condition of the Marietta and Cincinnati Railroad Company; the subsequent existence, or non-existence of the corporation, or its stock as a representative of value, will not affect the construction of the contract. Its terms determine the duties and liabilities of the parties each to the other.

If the lender has made no demand during the legal existence of such old company, or of its stock, and until after a return of such stock has become impossible, without fault of the borrower, his right to a return of such stock is gone, and he is not damaged by a failure afterward to return the same.

When a cause of action does accrue in such case, the measure of damage will be the market value of such stock at the time the cause of action accrued. If at that time the stock was worthless, only nominal damages can be recovered.

MAY 29, 1856, Samuel Fosdick transferred to William Greene "railway stocks and bonds" to the estimated sum of \$32,271.50, and at the same time Greene transferred to Fosdick, in payment, notes secured by mortgage on Chicago property estimated at \$30,735.63. This transfer of stocks to Greene included two hundred and twenty shares of stock in the Marietta and Cincinnati Railroad Company, which, at par with accrued interest, amounted to \$11,319.27, but in the transfer was put down at fifty-five per cent or \$6,225. June 1, 1856, Fosdick borrowed one hundred and nine shares of this stock from Greene, evidenced by the following writing:

"Borrowed of William Greene, Esq., one hundred and nine shares (\$5,450) of the capital stock of the Marietta and Cincinnati Railroad Company, returnable on demand, with interest on said

Fosdick v. Greene.

stock at the rate of eight per cent per annum from the first day of February last.

June 1, 1856.

SAMUEL FOSDICK.

109 shares, \$5,450

111 shares, 5,550

\$11,000

293.33. 4 months' interest at 8 per cent.

25.94. Marginal interest.

\$11,319.27. Or \$6,225.60."

The note and memorandum at the foot was written by Fosdick. On January 12, 1857, Fosdick borrowed from Greene one hundred and eleven shares of the stock of said company, and as evidence thereof gave Greene a writing as follows :

"Borrowed of William Greene, Esq., certificate for one hundred and eleven shares of Marietta and Cincinnati Railway stock, drawing interest at eight per cent from June 1, 1856 ; marginal interest, \$25.94. To be returned on demand, January 12, 1857.

SAMUEL FOSDICK.

111 shares, \$5,550.

Interest from June 1, 1856.

Marginal interest, \$25.94."

The transaction stood in this way until October, 1868, when a settlement was had between the parties for all matters, except this matter relating to the stock of the Marietta and Cincinnati Railroad Company, borrowed by Fosdick. About the same time, Greene, through his attorney, demanded payment for this Marietta and Cincinnati stock borrowed by Fosdick. No demand was ever made for a return of the stock. It is disclosed in the evidence that the stock of this company at the time of the borrowing was worth from fourteen to sixteen per cent, and remained on the market with some value attached for a time after this transaction, but with a downward tendency, until about the beginning of the year 1865, when it became wholly worthless, and has remained so ever since ; the company became embarrassed and finally insolvent. In 1858-9, under certain decrees of court rendered against the company, its property and rights were sold to Firene and others, and after that such other proceedings were had in law and by acts of parties that, in 1865, the company was reorganized and known as the Marietta

Fosdick v. Greene.

and Cincinnati Railroad Company as reorganized. Afterward the stock of the company was known as "old stock" and "new stock." The "new stock" was that issued by the company as reorganized; thenceforward the old stock had no intrinsic value—was worthless. In 1869, Greene commenced this action, in the Superior Court of Cincinnati, on the aforesaid written loan agreements, to recover the estimated price of the stock at the time of the loan, and eight per cent interest on the respective loans from dates named in the petition. In the view taken of the case by this court, it is not necessary to state any further facts in relation to the pleadings. On the issue joined between the parties, plaintiff recovered a judgment for \$3,816.73. Neither party being satisfied with this judgment, each party moved for a new trial. Motions overruled. And thereupon parties took bills of exception embodying all the testimony, which were allowed and filed in the action. Fosdick filed a petition in error for hearing in General Term, and Greene filed a cross-petition in error. On the hearing at General Term the court found there was no error as alleged by Greene in his cross-petition in error. And, as to the rights of Fosdick, no error had intervened to his prejudice, save that the judgment has been for too high a rate of interest. The judgment was corrected in that particular, and a judgment in General Term rendered in favor of Greene for \$3,302.42.

The plaintiff in error prosecutes his petition in error in this court, seeking to reverse both the judgment of the Superior Court rendered at Special Term, and also in General Term.

The errors assigned against the judgment and proceedings of the court at Special Term, are re-assigned in this court with some additional alleged causes of error. The following cover the questions involved in this decision, and we will notice none of the others:

The court (in General Term) erred in affirming the judgment of the court in Special Term.

The court at Special Term erred in overruling this plaintiff's motion for a new trial in said cause made at Special Term.

The judgment in Special Term was for the defendant in error, when upon the law and evidence it should have been for the plaintiff in error.

Stallo & Kettridge, for plaintiff in error. I. No breach of the contract set forth in the petition occurred, whereon an action could be maintained, until a demand was made of Fosdick for the return

of the stock named in the contracts. It is the demand and refusal which constitutes the breach of the contract and does the damage. *Lobdell v. Hopkins*, 5 Cow. 516; *Vance v. Bloomer*, 20 Wend. 196; *Moore v. Hudson River Railroad Co.*, 12 Barb. 156; *Noonan v. Ilsley*, 17 Wis. 314, and the same case, 21 id. 138; *Thrall v. Meade's Estate*, 40 Vt. 540; *Newman v. McGregor*, 5 Ohio, 349; *Russell v. Ormsbee*, 10 Vt. 274; *Frazee v. McChord*, 1 Carter (Ind.), 224; *Ewing v. French*, 1 Blackf. 170; *Martin v. Charins*, 7 Miss. 277; *Hotchkiss v. Newton*, 10 Ga. 560; *Wyatt v. Bailey*, 1 Morris, 396; *Hill v. Henry*, 17 Ohio, 9; *Darling v. Wooster*, 9 Ohio St. 517.

II. The measure of damages for a breach of the contract set forth in the petition is the value of the stock at the time of the breach of the contracts, which, from the preceding proposition, was at the time of such demand and refusal. *Chase v. Washburn*, 1 Ohio St. 244; *C. & P. R. R. Co. v. Kelley et al.*, 5 id. 180; *Robinson v. Noble*, 8 Peters, 181; *Eastern R. R. Co. v. Benedict*, 10 Gray, 212; *Smith v. Berry*, 6 Shepley, 122; *Bush et al. v. Canfield*, 2 Conn. 485; *Wells v. Abernethy*, 5 Conn. 222.

Rufus King and *S. J. Thompson*, for defendant in error. I. This loan was a *mutuum*, and in legal effect a sale, changing the property, throwing upon the borrower all the risks attending its return, and creating a debt. *Chase v. Washburn*, 1 Ohio St. 244; *Exchange Bank of Columbus v. Hines*, 3 id. 1, 27; Story on Bail., §§ 283, 370a, 415a. Demand of the stock was not necessary to the action. Demand of its value, as alleged in the petition, was sufficient. 1 Chitty's Pl. 159; *Thompson v. Shirley*, 1 Esp. 31; *Jones v. Chamberlain*, 30 Vt. 196; *Kenner v. Goodloe*, 2 Handy, 283.

II. The value at the time of the demand, or suit brought, is not the measure of damages in such a case. The rule is not general. It does not apply to stock contracts. *Bates v. Wiles*, 1 Handy, 532; and see 26 N. Y. 309; 31 id. 676; 26 Penn. St. 143; 19 Conn. 212; 23 Ind. 1. Nor to real estate contracts. *Buck v. Waddle*, 1 Ohio, 357; and see 34 Penn. St. 418, and 35 id. 23, which are both directly against the decisions in 5 Conn. 222, cited by plaintiff in error. Nor to contracts for merchandise when the price has been paid in advance. 3 Cow. 82; 27 Barb. 424; 12 Cal. 171; 17 id. 415; 4 Texas, 289; 13 id. 324. Nor is it true that in an action upon a contract the original consideration cannot be recovered. 15 Ohio, 123; 3 Jones' (N. C.) Law, 550; 2 Man. (G. & S.) 905.

Fosdick v. Greene.

III. But the rule claimed cannot apply here, because at the time of demand no such stock was in existence. That is the peculiar and controlling feature of the case. That the stock of the Marietta and Cincinnati railroad had become extinct is proved by the foreclosure and sale of their road and all its appurtenances, in 1860, to the new "Marietta and Cincinnati Railroad Company as reorganized," followed by the deed conveying its franchise and all its corporate rights and privileges to the new company, by virtue of the general act of April 4, 1863 (S. & S. 131). The corporate capacity of the new company cannot be collaterally impeached or questioned. *Webb v. Moler*, 8 Ohio, 548 ; 5 Ala. 787. The record of the suit of Noah L. Wilson, trustee, against the stockholders and creditors of the original company also proves that nearly all the old stock was surrendered in exchange for stock in the new company. The effect of all this was, the old company and its stock were defunct prior to 1868. Its charter was virtually surrendered.

IV. The risk of returning the stock being on the plaintiff in error, and the stock destroyed, the only possible measure of damages was its value at the time of the loan. The court had no other alternative. No intermediate time between the loan in 1857 and the demand in 1868 could be selected. The court was, therefore, unavoidably remitted to the value of the stock at the time of the loan. The plaintiff in error, as vendee, is bound for compensation. He owes the plaintiff, and the stock has been lost without any fault of the latter.

V. The value at the time of the loan being the measure of damages, and the parties, by their memorandum made at the time on the loan note, having put their own valuation upon the stock, that should govern. Why else was it put there? *Taft v. Wildman*, 15 Ohio, 123 ; *Barrett v. Allen*, 10 id. 426 ; Story on Bail., §§ 253, 253a. And see 2 Man. (G. & S.) 905 ; 3 N. H. 299 ; 12 Pick. 562 ; 10 Metc. 481 ; 1 Ohio, 189 ; id. 524 ; 4 Ohio St. 38 ; 12 id. 158 ; 5 id. 180.

ASHBURN, J. This action, as developed in the facts, is peculiar, and, so far as we have been able to discover, has no mate in the books. The authorities cast light upon some of its features, but in the main it rests upon its own facts. On May 29, 1856, Fosdick traded to Greene two hundred and twenty shares of Marietta and Cincinnati railroad stock, estimated at fifty-five cents on the dollar, or in gross \$6,225.60. The actual market value of the stock,

at that time, was from fourteen to sixteen cents on the dollar. June 1, 1856, Fosdick borrowed from Greene one hundred and nine shares of the same stock, and on the 12th of January, 1857, he borrowed the remaining one hundred and eleven shares. At each borrowing Fosdick gave Greene a written obligation showing the number of shares of stock borrowed, and a promise to return the shares of stock on demand.

By the writing Fosdick placed it in the power of Greene to require him to return the shares of stock at his pleasure, on demand. It was not the ordinary contract, familiar in the books, of a promise to pay a given sum or debt in specific articles, but was a loan of railroad stocks greatly depreciated. Stocks of this kind have ever been subject to such fluctuations in price that their market value could not and now cannot be estimated with any certainty at any time in the future. Like their creator, man, they are alive to-day and dead to-morrow. This fact was, doubtless, well known to these parties, who are business men of good capacity. We assume as a fact that this contract, with its conditions, was made with reference to this financial fact. They then knew the market value of this stock, gave to it a trading price, and each for himself calculated the chances of its appreciation and depreciation in the market. It was then heading downward. Greene, for reasons satisfactory to him, believing the stock would appreciate, armed himself with the power to demand a return of Marietta and Cincinnati railroad stock at his pleasure. On the other hand, Fosdick had faith that the market price of this stock would depreciate, and agreed to return Marietta and Cincinnati railroad stock when demand should be made, as he could pay them back at a less cost.

We are in harmony with the facts and relations of these parties in treating them as acting with full knowledge of the facts as they existed, and accepted the conditions that might transpire, in the financial and political community, in relation to what might be the future character and value of this railroad company's stock. The transaction, in the writing, is denominated a borrowing of stock; yet no doubt exists but that Fosdick acquired a present title to the stock and could transfer to his purchaser a good title. Fosdick's acquisition of title raised an obligation in favor of Greene, to be liquidated, according to the terms of the contract, by a return, on demand, of Marietta and Cincinnati Railroad stock in like quantity and quality.

Fosdick v. Greene.

This loan of stock, while not strictly a *mutuum*, assimilates nearer in principle to that doctrine of the law than any other. A *mutuum* "is a loan for use and consumption, the thing being bailed to be consumed and an equivalent in kind subsequently returned." 2 Addison on Contracts, 462. "In case of a loan, by way of a *mutuum*, the borrower is bound to restore, at the time agreed upon, or within a reasonable period after request, an article of the same kind and quality as originally lent to him." Id. 468. Applying this doctrine of *mutuum*, Fosdick would be required, within a reasonable time after demand, to return to Greene an equal number of shares of the stock, or certificate of old stock, of the Marietta and Cincinnati Railroad Company, because that would represent the quality and quantity of the thing borrowed.

In consonance with this doctrine it has been held, in numerous cases, that where payment in specific articles forms a material element of the written obligation, and no time is named for performance, before the promisor can be put in default and made liable to respond in money, there must be a demand and refusal. 20 Wend. 193 ; 5 Cow. 516 ; 10 Vt. 274 ; 1 Carter (Ind.), 224 ; 1 Blackf. 174 ; 10 Ga. 560 ; Morris (Iowa), 396. On the question of the measure of damages in such cases there is some difference of opinion. We think, however, the rule should be the market value of the specific thing in kind at the time default is made, whether default be made by act of the parties or by operation of law.

In this case the parties have contracted that Fosdick may discharge the obligation by a return of stocks when they are demanded, and Greene has reserved to himself the right to demand a return of stocks. As no default on the part of Fosdick can occur until demand is made of him for a return of stocks, Greene can have no cause of complaint, if by reason of his own neglect to make the demand the stocks depreciate. He is to fix a time for their return, and if at or before that time the stocks become worthless he must bear the loss. No claim for a recovery of money, in such case, can arise until demand is made, and if no demand is made until the commencement of the action, and that act is treated as a demand, and then the stocks are worthless, nominal damages can only be recovered.

It is urged in argument that the stock Greene transferred to Fosdick in 1856-7 had become in 1868 worthless ; had become extinct *de facto* and *de jure* by reason of the hopeless insolvency of the

company and forced sale of its franchises and property, and that this avoids all necessity for a demand. We do not think that is the law of this case. Where the mutuary is chargeable with no fault in relation to the article borrowed; has concealed no vice in the *mutuum*; has done no act himself, nor been the agency in procuring others to depreciate its value, and the *mutuum* to be discharged in kind becomes depreciated in value, less or more, the measure of damages is not the original consideration, but the value thereof on demand and refusal on day of restoration, in kind or money. As disclosed by the facts in this action, Fosdick had no more agency in depreciating the value of Marietta and Cincinnati Railroad stock, than Greene. In fact, neither of them contributed directly to that result. It was depreciated and became valueless by reason of its representing a something destitute of intrinsic value.

Where the *mutuum* is in special railroad stocks, greatly below par in value, subject to the well-known financial vicissitudes of that commodity in the market, the creditor must exercise reasonable diligence in the assertion of his rights. What is safe diligence for him in such case will depend upon the facts and law of each case. Where, by the terms of his contract, he is charged with the act of putting the debtor in default, he cannot safely lay by for many years, and until the railroad company is obliterated—its stock ceases to be of any intrinsic value—its rights and property all sold under decrees of court—deeds of conveyance, by the company, made of all its rights, property and franchises—its very existence, in every element, absorbed in another and different railroad organization. Such laches is fatal. The fact that Greene delayed commencing an action until performance on the part of Fosdick was impossible is a potential fact of willful negligence, destructive of any right of action he once may have had.

It is argued with ability that notwithstanding the destruction of the stock, the mutuary's risk continues, and his liability continues. That having lost the option to pay in stock his liability to pay in money remains. Counsel seem to lose sight of the fact that, by the contract of the parties, the first movement in relation to payment is to come from Greene. Fosdick may safely lie still in the matter until spoken to by Greene in relation to the payment. By no principle of the law does the fact, as claimed by plaintiff, that the stock was valueless or had become extinct by the sale of the road, enlarge

Fosdick v. Greene.

his rights ; but, on the contrary, such negligence as his in the matter was fatal to his cause of action.

The court is not authorized to make a better case for the plaintiff than he made for himself. The parties may know that no such stock could be had in 1868. But the plaintiff failing to make a demand for the stock is in no situation to legally require Fosdick to return the stock. For any thing we know, from the facts disclosed in this case, Fosdick may now be in possession of the identical stock he borrowed from Greene in 1856-7.

If demand had been made or circumstances existed that would avoid the necessity of a demand, what would be the measure of damages ?

The decisions in the States on this question are not uniform. In some it has been held, where a note is payable in specific articles, bank notes, stocks or scrip, at a stipulated price, the party may recover, upon a breach of the contract, the sum named in the contract, and will not be remitted to the market value on the day of payment. In other States the reverse of this is held to be the true rule.

In this case, had demand been made, or if the facts and circumstances of the case rendered a demand unnecessary, Fosdick would be required to pay Greene so many shares of stock, or dollars counted on the face of the stock, as, when estimated at par, would be two hundred and twenty shares of old stock, or \$11,000 with the accruing interest, payable in money or stock according as the original issue of stock required. This, we think, was the meaning of the parties and the sense of the contract. This would have satisfied the loan, whether the stock was, in the market, above or below par.

When, by its terms, a contract is to be paid in the notes of a particular bank, stock, or scrip in the similitude of bank notes, the market value of the bank notes, stock, or scrip, at the time they are required to be paid, is the measure of damages. And a sufficient reason for the rule is that, when a party engages to pay so many dollars in bank notes, stock, or scrip, the articles described are numerically calculated by the numbers they express on their face, so that the sum of money named in the railroad stock is understood to mean that amount as expressed on the face of the stock certificate, and not an amount that will be equivalent to that number of cash dollars. \$11,000 in the stock of the Marietta and Cin-

cinnati Railroad Company does not mean \$11,000 in money, but \$11,000 as expressed on the face of the stock, the nominal sum of that much interest in the franchises of the company. An instrument drawn for so many dollars, payable in wheat or other commodity, means so much of the article named, as will, in the market, amount to the sum of the dollars named in the contract. And this is so, because the things themselves cannot be counted by dollars, since the name of dollars is never applied to them. 10 Ind. 20 ; 1 Blackf. 346 ; 2 S. & M. 485 ; 7 Humph. 83 ; 3 Littell, 246.

The case of *Wm. Robinson, Jr. v. Wm. Noble's Adm'r*, 8 Pet. 181, decided by Judge McLEAN, gives the true rule for the measure of damages. Noble, by a written agreement, was to transport, on a steamboat, certain stores to St. Louis, the agreed price for the transportation to be paid, one-half at St. Louis and one-half at Cincinnati, in paper of banks current there at the time of the delivery of the stores at St. Louis. To the written agreement was attached a memorandum in writing, as follows : "It is understood that the payment to be made in Cincinnati is to be in the paper of the Miami Exporting Company, or its equivalent." On the trial, the defendant asked the court to charge the jury that the plaintiff could not recover more than the actual value of the paper of the Miami Exporting Company at the time it became due, according to the scale of depreciation. The court refused to give this, but did instruct the jury that the true measure of damages was the numerical value of the paper of the Miami Exporting Company, in specie, with interest. When disposing of the case, on error, Judge McLEAN says : "The express provisions of the contract show that the payment at Cincinnati was not to have been made in specie. The notes of the Miami Exporting Company were substituted by the parties as the standard of value which shall discharge this part of the agreement ; and the payment of these notes, or any others of equal value, was all that Noble had a right to demand. But it is contended that, as the payment was not made at the day, it must needs be made in specie, and to the full amount of the sum agreed to be paid in depreciated paper. * * * The notes of the Miami Exporting Company purported to be money, and may, to some extent, at the time, have circulated as such in business transactions ; but it is manifest they were not considered as money by the parties to this contract, but as a commodity, the value of which is to be ascertained by the amount of specie it will bring in the market.

Fosdick v. Greene.

* * * Had these notes been equal to specie, on the day of the payment, Robinson was bound to pay them, or what was of equal value. If they had depreciated to fifty cents on the dollar, Noble was bound to receive them, in discharge of the covenant. Each party incurred a risk in the fluctuation of the value of the notes specified. * * * Robinson can only be held liable to make good the damages sustained through his default; and the specie value of the notes, at the time they should have been made, is the rule by which such damages are to be estimated." 2 Addison on Contracts, 473.

We conclude : Railroad stock loaned to be returned on demand is in the nature of a *mutuum*, and is governed by like legal principles, so far as they apply to the facts of the case. The solvency or insolvency of the company, and worthlessness of the company's stock, when caused by no agency of the borrower, neither increases nor diminishes the rights or liabilities of the parties, in respect to the stock, under the contract. When the lender has been so far guilty of negligence that he has seen the road company become insolvent, its rights and property publicly sold under decrees of court, the company become extinct and its stock of no intrinsic value, without asserting any of his legal rights, he loses his right of action against the borrower, both as to return of stock and pecuniary damages. When, by the terms of the agreement, the stock is to be returned on demand, no right of action accrues until demand is made. And when such cause of action does accrue, the measure of damages is the value of the stock at the time the cause of action accrued.

Judgment of Superior Court in General Term reversed, and also judgment at Special Term reversed, and cause remanded for further proceedings.

SCOTT, C. J., DAY, WRIGHT and JOHNSON, JJ., concur.

PENNYWIT V. FOOTA.

(37 Ohio St. 600.)

Judgment — of a Confederate court— effect of, in another State — jurisdiction — authority of attorney.

An action was brought in Arkansas in 1857 against a citizen of Ohio, who appeared therein by an attorney duly authorized and filed his plea; in 1861, after the State had seceded, the action was tried, the same attorney defending it, and judgment rendered for the plaintiff. In an action on such judgment brought in Ohio, *held*, (1) that want of jurisdiction in the Arkansas court could be shown; (2) that the judgment was void as the judgment of a court created by unlawful authority; (3) that the attorney could not confer jurisdiction by consent.

NORM. — The following is the syllabus prepared by the court:

Neither the constitutional provision, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.

The record of a judgment rendered in another State may be contradicted, as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

Such want of jurisdiction may be shown either as to the subject-matter, the person, or in proceedings *in rem* as to the thing.

The ordinance of secession of the State of Arkansas, the Constitution adopted March, 1861, and the several steps taken by that State, by which it was attempted to secede from the United States and join the Confederate States, were null and void, being in violation of the Constitution of the United States, and the existing Constitution of the State.

The State government founded on such new Constitution, and maintained by armed rebellion, was an insurrectionary and unlawful government, and not the legal representative of the State as one of the United States, and its acts and judicial proceedings in violation of the Constitution of the United States or in derogation of the rights of its citizens, were null and void.

The provision of such Constitution, "Schedule, § 1.— That no inconvenience may arise from this change of government, we declare that all writs, actions, prosecutions, judgments, claims and contracts of individuals and bodies corporate shall continue as if no change had taken place in the Constitution or government of this State; and all process which may have been issued under the authority of this State previous to this time shall be as valid as if issued after the adoption of this Constitution," did not operate during the war to transfer to the courts of the usurping government the jurisdiction previously acquired by the court under the former State government over persons resident in the adhering States.

Pennywit v. Foote.

ACTION by the plaintiffs against John T. Foote, impleaded with Sheldon Kellogg, late partners, to recover on a judgment rendered against said Kellogg and Foote, in the Circuit Court of Crawford county, in the State of Arkansas, on the 16th of November, 1861.

The petition contains an averment that said court was a court of record and general jurisdiction; that the action was commenced in that court in October, 1857, and that at the July term of said court, in 1859, the defendants duly appeared by their attorney and filed their plea to the action, on which such proceedings were had; that at the November term of said court, in 1861, a judgment was rendered for plaintiffs for \$960 damages, and for costs.

To this petition John T. Foote answered (Kellogg not being served) that the pretended judgment was rendered in the State of Arkansas, whose people, and the so-called government of the State, were at the time, and for a long time had been, in armed rebellion against the authority and government of the United States, and by a pretended court, acting under the pretended authority of a so-called government, which was in rebellion and engaged in making war upon the United States, wherefore it is claimed there is not any record of such a judgment.

To this answer a demurrer was filed, and upon the question thus raised the case was reserved for decision of the court in General Term. This demurrer was sustained, and cause remanded to Special Term. An amended answer was filed setting forth in substance that on the 26th day of October, 1857, the said defendant was a citizen and resident of Ohio and so continued up to June, 1863, when he removed to New York and subsequently to New Jersey;

The Circuit Courts of that usurped government was a constituent part thereof. Their judicial proceedings, within their military lines and during the war, are not such as are, under Art. IV, § 1, of the Constitution of the United States and the act of Congress, entitled to full faith and credit.

As between parties residing in the State of Arkansas and within the rebel lines, and a citizen of Ohio, resident within the Union lines, between whom the war made intercourse impossible, there could be no jurisdiction in such court, by which the rights of non-residents could be injuriously affected.

Neither could such jurisdiction be acquired by the consent or waiver of an attorney practicing in said court, who was employed and appeared for the non-resident defendants before the war commenced. His general authority as an attorney, before the war, though not revoked by the clients, did not authorize him to waive any of their rights, nor could such consent or waiver confer on the court jurisdiction over the case, or over the person of defendants.

that on said 26th of October, 1857, the State of Arkansas was in its normal condition as a State of the Union, and that he had a right to prosecute and defend actions in the courts of said State, the same as citizens of the United States and the State of Arkansas; and that he did employ counsel and appear in said case for the purpose of setting up and maintaining a defense to said action.

That subsequently the State of Arkansas seceded and declared and waged war against the United States, and established a pretended government, and that the said court in which said judgment was rendered, was, at the time, a court under the authority of said government, and not under the authority and jurisdiction of the United States, and that the judge who rendered said judgment was not and never had been a judge of the State of Arkansas, but was a person acting under the authority of the said usurped and illegal government.

To this was the following reply :

“The plaintiffs, for reply to the amended answer of the defendants, say that the Circuit Court of Crawford county, in the State of Arkansas, in and by which the said judgment in the petition mentioned was rendered, was and is the same court in which said suit by the plaintiffs against the defendants, in the petition mentioned, was instituted on the 26th day of October, 1857, and in which the said defendants appeared and pleaded their pretended defense, mentioned in their said amended answer, and was not another or different court, as pretended in said answer, and was, at the commencement of said suit, and thence continually until and at the time of rendering said judgment, a court of general jurisdiction in law and equity, lawfully established and proceeding under and by virtue of the Constitution and laws of the said State of Arkansas, and that the judge of said court, who rendered said judgment, was, at the time when he rendered the same, duly appointed, qualified, and acting as such, under and by virtue of the Constitution and laws of the said State of Arkansas. And plaintiffs aver that, by the law and usage of the said State of Arkansas, the said judgment of said court now is and ever since the rendering thereof has been of full force and effect, and that the same, at and ever since the commencement of this action, had and now has absolute verity, faith, and credit in all the courts of said State, and remains wholly unreversed; and they deny each and all averments in said answer to the contrary.”

Pennywit v. Foote.

The case was submitted upon the foregoing pleadings, and upon an agreed statement of facts in support thereof. In this statement were exhibits showing as follows :

Exhibit No. 1 is a copy of the record of the Arkansas judgment authenticated in due form.

It shows that proceedings by attachment were begun in 1856, and at the February term, A. D. 1858, "the said defendants, by their attorney, Jesse Turner, entered their appearance," and gave their consent to the filing of an amended declaration.

Afterward, in August, 1858, defendants, by their attorney, appeared, and, on his motion, leave was granted them to take testimony by depositions, which appears to have been done by defendants as well as plaintiffs. At July term, 1859, the defendants, by said attorney, filed their plea in the nature of a general denial.

Finally, at the November term, 1861, "the said parties, by their respective attorneys, appear, and neither party requiring a jury, this cause is submitted to the court, sitting as a jury, by *consent of parties* ;" and, after hearing the evidence, judgment was rendered against the defendants, whose attorney filed a motion for a new trial, which being overruled, he took a bill of exceptions, which is also made part of the record.

Exhibit No. 2 is composed of extracts from the Constitution of Arkansas, adopted March 4, 1861, by a convention called in due form by act of the legislature, passed January 16, 1861. This convention, on the 6th of May, 1861, adopted an ordinance of secession in the usual form; and also this Constitution, and united with other States in forming the new government called the Confederate States of America, and as such State engaged in the war of the rebellion.

Under this new Constitution, it was declared that all writs, actions, prosecutions, judgments, claims, and contracts of individuals and bodies corporate should continue as if no change had taken place in the Constitution or government of the State, and all process previously issued should be as valid as if issued after its adoption.

It was further declared that all officers under the authority of the State shall continue to hold office until their terms expire under the provisions of this new Constitution, and all were required to take an oath to support the Constitution of the Confederate States of America, as well as of the State, and to abide by and observe all

the ordinances passed by the convention aforesaid. Upon this foundation, a State government was set up; the State, from its standpoint, was an independent State, united by compact with the Confederacy. As such, she resorted to arms.

King, Thompson & Avery, for plaintiff in error. I. The record of the judgment in the Arkansas court was entitled to the same faith and credit which it had by law and usage in that State. Constitution of United States, art. 4, § 1, Act of Congress, May 26, 1790, 1 Stat. at Large, 122. As to its validity by the law of Arkansas, see *Hawkins v. Filkins*, 24 Ark. 286, 295, 296, 316, 326; *Beller v. Page*, id. 363; *Belding v. Godwin*, id. 486; art. 4, § 1, Constitution of United States; *White v. Cannon*, 6 Wall. 443; *Hughes v. Stinson*, 21 La. Ann. 540; *Hill v. Boyland*, 40 Miss. 618; *Harlan v. The State*, 41 id. 566; *Brown v. Wright*, 39 Ga. 96; *Bennett v. Morley*, 10 Ohio, 100; *Mills v. Duryee*, 7 Cranch, 481; *Mayhew v. Thatcher*, 6 Wheat. 129; *Caldwell v. Carrington's Heirs*, 9 Pet. 86; *M'Elmoyle v. Cohen*, 13 id. 312; *Spencer v. Brockway*, 1 Ohio, 260; *Silver Lake Bank v. Harding*, 5 id. 545; *Goodrich v. Jenkins*, 6 id. 44; *Anderson v. Anderson*, 8 id. 108; *Arndt v. Arndt*, 15 id. 33; *Scott v. Pilkington*, 2 Best & Smith, 11; 110 Eng. Com. Law, 10; *Jones v. Walker*, 2 Penn. 689; *Lessee of Le Grange v. Ward*, 11 Ohio, 257; *Daniels v. Stevens, Lessee*, 19 id. 222; *Peck v. Jenness*, 7 How. (S. C.) 612; 17 Ohio, 409; *Paine's Lessee v. Moorland*, 15 id. 435. But in the Superior Court it was treated as *ex parte*, and a nullity.

II. The States which seceded in rebellion did not thereby lose their existence or "independent autonomy." Arkansas continued to be a State, and a State of the Union, and the functions of all departments of the State—legislative, executive or judicial—were unimpaired. Their acts and proceedings were valid, except such as were in aid or furtherance of the rebellion. The Confederacy and its measures are held void because it was organized by and for treason only. But the States stood upon a different footing. *Texas v. White*, 7 Wall. 700; *Sprott v. United States*, 20 id. 459, 464; *United States v. Insurance Companies*, 22 id. 99; *Horn v. Lockhart*, 17 id. 570; *Taylor v. Thomas*, 22 id. 479, 489.

III. The court erred in applying to a defendant the doctrine of *persona standi in judicio*, which in war suspends contracts by reason of the plaintiff's disability to sue in the enemy's country.

Pennywit v. Foote.

1 Kent's Com. 68; *Griswold v. Waddington*, 16 Johns. 438. The plea of alien enemy is available only against the plaintiff, and even then is most strictly construed. 1 Chitty's Pl. 479; *Clarke v. Morey*, 10 Johns. 69; 3 Camp. 150, 153; 13 Ves. 71, 72, and note. Alien enemy may be sued, though he cannot bring suit. MILLER, J., 18 Wall. 106, 111. And as to this see *White v. Cannon*, 6 Wall. 443; *McVeigh v. United States*, 11 id. 259; *University v. Finch*, 18 id. 106; *Vanbrynen v. Wilson*, 9 East, 321; *Buckley v. Lyttle*, 10 Johns. 117.

The suit in Arkansas was begun, and the defendants, by their attorney, had appeared and pleaded prior to the war. The jurisdiction of the court continued unbroken. The war would have been ground for a continuance, if applied for, but did not abate the suit.

IV. Giving the record due faith and credit, it disclosed the fact that the defendants, by their attorney, submitted the cause and went to trial without objection. The attorney was appointed before the war. No revocation of his authority was shown. The war did not work a revocation. *Buchanan v. Curry*, 19 Johns. 137; *Ward v. Smith*, 7 Wall. 447; *Botts v. Crenshaw*, Johnson's C. C. 224; *Anderson v. The Bank*, id. 535; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614; *Monsseaux v. Urquhart*, 19 La. Ann. 482.

V. The authority of an attorney at law is presumed, and the submission of the case by the defendant's attorney to the Arkansas court was conclusive upon them, unless relieved against, in the manner pointed out in *Abernathy v. Latimore*, 19 Ohio, 286; *Treasurer of Champaign County v. Norton*, 1 id. 270; *Porter v. Critchfield*, 3 id. 518; *Pillsbury v. Dugan's Adm'r*, 9 id. 117. The rights of defendants as citizens were not impaired. They had their day in court. 1 Ohio, 270.

McGuffey, Morrill & Strunk, and *Geo. Hoadley*, for defendants in error. I. As to the record of a judgment of one State called in question in another. U. S. Const., art. 1, § 1; U. S. Stat. at Large, 122; *Bartlet v. Knight*, 1 Mass. 401; 2 Pars. on Cont. 607; *Hitchcock v. Aicken*, 1 Caines, 460; *Thomison v. Whitman*, 18 Wall. 457; *Maxwell v. Stewart*, 22 id. 77.

II. As to the validity of a judgment rendered against a resident of a State adhering to the Union during the late war. by a court of a seceding State, etc., and as to whether jurisdiction that had

Pennywit v. Foote.

once attached was suspended by the war. *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. 232; *The Prize Cases*, 2 Black, 635; *Livingston v. Jordan*, vol. 10, No. 1, Am. Law Reg. 55; *Hanger v. Abbott*, 6 Wall. 532; *The Protector*, 9 id. 687; *Dean v. Nelson*, 10 id. 158; *Railroad Co. v. Trimble*, id. 367; *Ludlow v. Ramsey*, 11 id. 581; *Levy v. Stewart*, id. 244; *Conley v. Burson*, 1 Heisk. (Tenn.) 145; *Texas v. White*, 7 Wall. 700; *University v. Finch*, 18 id. 106; *Galpin v. Page*, id. 350, *Mitchell v. U. S.*, 21 id. 350, 368; *Fretz v. Stover*, 22 id. 198, 206; *Taylor v. Thomas*, id. 479, 489; *Ross v. Jones*, id. 576, 586; *Perkins v. Rogers*, 35 Ind. 124; *Lasere v. Rochereau*, 17 Wall. 437; *Cappell v. Hall*, 7 id. 542; *McVeigh v. U. S.*, 11 id. 259.

III. Whether the government of Arkansas had a *de facto* or a *de jure* existence, or was merely a usurpation, the court is referred to 7 Eng. Stat. at Large, 436; *Bolton v. Arme*, Cases in Chan. 55; *Harrison v. North*, id. 83; *Latham v. Clark*, 25 Ark. 574; *Robertson v. Shores*, 7 Coldw. 164; *Hennen v. Gilman*, 20 La. Ann. 242; Twiss' Law of Nations, 297; *Griswold v. Waddington*, 15 Johns. 57; *The Prize Cases*, 2 Black, 635; *Martin v. Hewitt*, 44 Ala. 418; *Noble & Bro. v. Cullom & Co.*, id. 554; *Texas v. White*, 7 Wall. 701; *Bank of Tenn. v. Woodson*, 5 Coldw. 176; *Conley v. Burson*, 1 Heisk. 145; *Cassell v. Backrack*, 42 Miss. 56; *Thomas v. Taylor*, 42 id. 651.

JOHNSON, J. The facts disclosed present for our consideration important and novel questions growing out of the late civil war. They involve a determination of the legal effect of the secession of the State of Arkansas, and the war that ensued, upon the power of the courts of that State, during the war, to render judgment against a citizen of Ohio, and also the extent to which faith and credit should be given to a judgment thus rendered, under the Constitution and laws of the United States.

On behalf of the plaintiff it is claimed that full faith and credit should be given to this judgment, under article 4, section 1 of the Constitution of the United States, as a judicial proceeding of a State; but if it is not such, then at least it is entitled to all the verity of a foreign judgment, as the proceeding of a *de facto court* having jurisdiction of the case and the parties.

The defendant insists that this is not the record of a court of a State of the Union; that while the act of secession was void, and the State was never legally out of the Union, yet the government

Pennywit v. Foote.

that was set up by the people of the State was a revolutionary usurpation in violation of the Constitution ; that this government was a government of force, maintained by arms ; that all its acts, legislative, executive and judicial, were, as to the United States and its citizens, null and void.

It is further insisted that this was a war, in the sense of public law, and that the courts of Arkansas had no power to proceed to judgment against defendants ; that they were by the war, and the duty which was imposed, as well as by the danger attending it, forbidden to appear and defend.

It appears that this action was begun by the plaintiff in the Circuit Court of Crawford county in 1857.

Personal appearance was entered and issue joined prior to the war. After the State had joined the Southern Confederacy, and while it was in arms against the Union, the case was tried. The attorney for defendants, who was retained and appeared before the war, continued to do so on the trial of the case, and consented to a trial. It is claimed these facts gave the court jurisdiction over the person, but the other side insists that such appearance could confer no power on the court to do an unauthorized act, and that the war worked a revocation of his agency.

1. Article 4, section 1 of the Constitution of the United States provides, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State ; and the Congress may, by general laws, prescribe the manner in which such acts and proceedings shall be proved, and the effect thereof." Under the power thus conferred, Congress passed the act of May 26, 1790, which provided that "the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form. And the said records and proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence said records are or shall be taken."

Leaving out of view for the present the facts relied on as a defense in this case, let us inquire as to the scope and meaning of this constitutional provision and the act of Congress.

What acts, records, and judicial proceedings are entitled to full faith and credit, and what is a judgment of a court of a State that imports absolute verity?

By the act of 1790, a judgment which is valid in the State where rendered becomes, in the other States, a debt of record, not re-examinable upon the merits, but it does not carry with it into another State the efficacy of a judgment against person or property that can be enforced by execution. To give it that force in another State, it must by action be made the judgment of such other State.

Hence it follows that such judgment is only *evidence* in another State that the subject-matter of the original suit has become a debt of record, which cannot be avoided by a plea of *nul tiel record*. *M'Elmoyle v. Cohen*, 13 Pet. 312.

In an action on such judgment in another State whatever pleas would be good in the State where rendered would be good in such other State. *Hampton v. M'Connel*, 3 Wheat. 234.

The constitutional provision was not intended to confer a new power of justification on the courts of any State, but to prescribe the effect in other States of the acknowledged jurisdiction over persons and things within the State. Every judgment depends, for its force and validity, on the competency and authority of the tribunal which pronounces it, and may be assailed by showing a want or failure of jurisdiction over the subject-matter or the person, even though absolutely conclusive in other particulars.

The manifest design of the Constitution was to give faith and effect to *valid* judgments, and not to enable the courts of one State to exercise a usurped or illegal authority over the citizens of other States of the Union, who are not amenable to the jurisdiction of the tribunal.

Without the constitutional provision and the act of 1790, the judgments of one State would stand in the tribunals of the others, on the same footing as *foreign judgments*, and only be respected on the principles of comity between nations, and not as a duty imposed by the paramount organic law. How far such judgments of a State of the Union, when duly authenticated, are entitled to faith and credit, and are conclusive, is a problem by no means free from difficulty. It has been productive of numerous decisions, not always harmonious.

One of the earliest cases was *Bissell v. Briggs*, 9 Mass. 462, where it was said: "Whenever, therefore, a record of a judgment of any

Pennywit v. Foote.

State is produced as conclusive evidence, the jurisdiction of the court is open to inquiry. And upon the same principle, if a court of any State should render a judgment against a man not within the State, not bound by its laws, nor amenable to the jurisdiction of its courts; and if that judgment should be produced in any other State against the defendant, the jurisdiction of the court might be inquired into, and if a want of jurisdiction appeared, no credit would be given the judgment.

“In order to entitle the judgment rendered to the full faith and credit mentioned in the Federal Constitution, the court must have jurisdiction, not only of the cause, but of the parties.”

The same view was declared and enforced in *Hall v. Williams*, 6 Pick. 232.

In *Rose v. Himely*, 4 Cranch, 241, Chief Justice MARSHALL says: “Upon principle, it would seem that the operation of every judgment must depend on the *power of the court* to render that judgment. * * * In some cases, the jurisdiction depends as well on the *state of things* as on the constitution of the court.”

For a long time after the adoption of the Constitution, it was supposed that its effect, in connection with the act of 1790, was to render the judgments of each State equivalent to domestic judgments in every other State; and this view was supported by the language of the court in *Mills v. Duryee*, 7 Cranch, 484. It was so held in that case, and that a plea of *nil debet* was not a proper plea to an action on such judgment.

So far as the merits of that case are concerned, the doctrine there laid down is still adhered to; but as to the validity of a judgment dependent on the power of the court, quite a different view is now entertained.

Mr. Justice STORY, who delivered that opinion, elsewhere says: “But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it; *or the right of the State itself* to exercise authority over the person or the subject-matter. The Constitution did not mean to confer upon the States a new power or jurisdiction, but simply to regulate the acknowledged jurisdiction over persons and things within their territory.” Story on Const., § 1313. Again he says: “It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity and credit to them as evidence.” Story’s Conf. of Laws, § 609.

Chancellor KENT (1 Kent's Com. 281, and vol. 2, p. 95, and note) says: "It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit."

This distinction is strongly supported by *D'Arcy v. Ketchum*, 11 How. (S. C.) 165, where the case of *Mills v. Duryee* was limited and explained.

It was there held that the constitutional provision and act of Congress giving full faith and credit to the judgments of each State, in every other State, do not refer to judgments rendered by a court having no jurisdiction of the parties — that it only referred to valid judgments.

It is an important feature of that case, that by the law of the State of New York, where the judgment was rendered, it was valid. It was a judgment against two joint debtors, only one of whom was served. Under the State law, this was a valid judgment against *both*, and if the language of the act of 1790 had full force, this judgment, when properly authenticated, "shall have such faith and credit given it in every court within the United States as it had by law or usage in the courts of the State from whence it was taken;" and yet when sued on in Louisiana, it was held void as to the party not served, though valid by New York law. It was said: "The international law as it existed among the States in 1790, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of the courts of justice had binding force. * * * In our opinion Congress did not intend to overthrow the old rule."

In *Webster v. Reid*, 11 How. 437, the defendant offered to defeat the force of a judgment by showing want of service, and it was held it could be done.

In *Starbuck v. Murray*, 5 Wend. 148, it is said: "Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped by any allegation in the record from proving any fact that goes to establish the truth of the plea alleging want of jurisdiction. So long as the question is in issue, the judgment of a court of another State is, in effect, like a foreign judgment — it is *prima facie* evidence."

Pennywit v. Foote.

From a careful review of numerous cases, we find the rule now well settled that neither the constitutional provision, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court in which a judgment offered in evidence was rendered, and such a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist, and this is true either as to the subject-matter or the person, or in proceedings *in rem* as to the thing. *Harris v. Hardeman et al.*, 14 How. (S. C.) 334; *Borden v. Fitch*, 15 Johns. 121; *Christmas v. Russell*, 5 Wall. 290; *Elliott v. Piersol et al.*, 1 Pet. 328; *United States v. Arredondo*, 6 id. 691; *Voorhees v. Bank of U. S.*, 10 id. 475; *Moulin v. Insurance Co.*, 4 Zab. 222; *Mackay v. Gordon*, 34 N. J. 286; *Wilson v. Bank of Mt. Pleasant*, 6 Leigh, 570; Story on Const., § 1307; Story's Confl. of Laws, § 609; *Thompson v. Whitman*, 18 Wall. 457; *Spencer v. Brockway*, 1 Ohio, 261; *Goodrich v. Jenkins*, 6 id. 43; *Anderson v. Anderson*, 8 id. 108; *Paine's Lessees v. Mooreland*, 15 id. 435.

It follows, that while a judgment of a competent court of any State of the Union, that has jurisdiction or authority over the person and subject-matter, is conclusive upon the merits of the controversy in every State, yet the power of the court to render it is an open question in an action like the present.

It is competent, therefore, in such action, to inquire into the authority of the pretended court to exercise judicial functions, whether this record comes from a lawful tribunal within a State of the Union, whether that tribunal had jurisdiction of the subject-matter, and whether it had by any legal method obtained jurisdiction over the person, in order to determine whether it was a valid judgment under the Constitution. Either of these inquiries does not affect the merits of the controversy in the original action.

II. Was this record a judicial proceeding of a court of one of the States of the United States?

The State has seceded and dissolved its connection with the United States. It declared independence, and joined the Confederacy. These acts were null and void, but on this foundation a new Constitution with allegiance to the Confederate States was

adopted, and for the time was maintained by armed rebellion. Civil war ensued. The existence of this new authority was being determined by wager of battle.

This usurping government was one unknown to the Constitution, and in direct antagonism to it and the authority of the Federal laws and authority. It could acquire no legal authority over the people of the United States, and no actual power beyond the range of its guns. When the armed forces, raised to establish this new government and make good their declaration of secession and independence, surrendered, this unlawful State government fell. The present Constitution and State government of Arkansas is not the successor of that, and derives none of its power from its prior existence. The Congress refused to recognize it, or the validity of its acts. By the reconstruction acts, it was declared there was no legal State government to represent the State in the Union, and Congress took steps to organize a government in conformity to the paramount laws of the Union.

The courts of this usurped State government, set up on the ruins of the old, and dependent for its existence on organized treason, had no power over citizens of other States not domiciled there. It could acquire none by the steps taken. The defendants might cheerfully enter their appearance, and consent to have their case tried by a court of a State government, in harmony with the Union, that recognized the binding force of the Constitution and laws of the United States, and where he was entitled to all the rights and immunities of a citizen of the United States, while he would be utterly unwilling to consent to be tried by a foreign court of a nation at war with his government, and where his rights as American citizen are ignored.

These defendants never consented to surrender their rights as citizens of the United States, guaranteed by its laws, and commit the issue to a court of new organization. The convention had no power to transfer this case from out the protection of Federal laws, and make it amenable to the decision of a court unknown to them. What, then, was the status of the State of Arkansas, and the Circuit Court of Crawford county, under the new State organization, as a State of the Confederacy?

In *Texas v. White*. 7 Wall. 700, Chief Justice CHASE says: "Not only, therefore, can there be no loss of the separate and independent autonomy of the States, through their Union under the

Pennywit v Foote.

Constitution, but it may be not unreasonably said that the preservation of the States, *and the maintenance of their governments*, are as much within the design and care of the Constitution as the preservation of the Union and maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible States. * * * Our conclusion, therefore, is that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred."

In these remarks, the word *State* is used, not to mean the *political organization* or *government*. The Chief Justice says: "The people, in whatever territory, dwelling either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the State. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed. It is the union of such States, under a common Constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it, one people and one country." Using the term "State" in this sense, it was said by the court "that Texas continued to be a State, and a State of the Union." After reciting the steps taken by the State to go out of the Union and join the Confederacy, much the same as in case of Arkansas, it is added: "When the war closed there was no government in the State, *except that which had organized for the purpose of waging war on the United States*. * * * That government immediately disappeared, * * * There being no government in constitutional relations with the union, it became the duty of the United States to provide for the restoration of such a government." Speaking of the acts of the rebel legislature of Texas, the court say: "It cannot be regarded in the courts of the United States as a *lawful legislature, or its acts lawful*."

It is added, however, that it was for some purposes a government *de facto*, an actual government, which, though unlawful and revolutionary, possessed power over its own people, in such matters as did not affect the duty of the State, or the people of the State, to the Union. The Chief Justice says:

“It is not necessary to attempt an exact definition within which the acts of such a State government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens—such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries of person and estate, and other similar acts, which would be valid if emanating from a lawful government—must be regarded as valid when proceeding from an actual, though unlawful, government; and that acts in furtherance and support of the rebellion against the United States, and intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.”

Horn v. Lockhart, 17 Wall. 570, involved the power of a Probate Court of Alabama to make an order, during the war, based on an act of the legislature authorizing an executor to invest trust funds in Confederate bonds. It is said: “No legislation of Alabama, no acts of its convention, no judgment of its tribunals, and no decree of the Confederate government can make such a transaction lawful.”

It is further said: “That the acts of the several States, in their individual capacities, and of their different departments of the government, executive, *judicial*, and legislative, during the war, so far as they do not impair or tend to impair the supremacy of the national authority, *or the just rights of citizens under the Constitution*, are, in general, to be treated as valid.”

Huntington v. Texas, 13 Wall. 650, turned on the power of the government of Texas, during the rebellion, to pass title to certain bonds of the United States, owned by the State. It is said, “whether the alienation of the bonds by the *usurped government* divests the title of the State, depends, as we have said, upon other circumstances than the quality of the government. If the government was in the actual control of the State, the validity of its alienation must depend *on the purposes and object of it*.”

The same point was before the Supreme Court in *Taylor v. Thomas*, 22 Wall. 479.

The rebel legislature of Mississippi passed an act authorizing the issue of \$5,000,000, in what was called “cotton notes,” issued in form of currency, with which the State purchased cotton during the blockade. It is said: “That the legislature in ques-

Pennywit v. Foote.

tion, subsequent to the adoption of the secession ordinance, and of the ordinance by which the State acceded to and became a member of the insurrectionary Confederacy, *ceased to represent the State as a constitutional member of the Federal Union.*"

These usurped State governments were not the States, and while the States, in the legal and constitutional meaning of the term, were still in the Union, the political organization, the governments in armed rebellion, were insurrectionary and unlawful. It did not represent the States as members of the Federal Union.

In *Thorington v. Smith*, 8 Wall. 1, the character of the Confederate government, formed by the seceding States, is considered, as it affected contracts of citizens, *within its military lines*. It is styled a government of "paramount force," whose existence is maintained against lawful authority by active military power. It is said, its existence was never acknowledged by the United States, even as a *de facto* civil government, but, while it existed, it was necessarily the duty of private citizens to acquiesce in its authority, and for such obedience the private citizen was not liable to his lawful government. On this ground, between citizens resident within its jurisdiction, a contract to pay in Confederate notes was valid.

In support of this view is the case of *United States v. Rice*, 4 Wheat. 246, where it was held that the inhabitants of the village of Castine, in Maine, which was captured by the British in the war of 1812, and held until the treaty of peace, in 1815, passed under a temporary allegiance to the British government, which, as to them, suspended the operation of the laws of the United States.

So the military conquest and occupancy of Tampico and the State of Tamaulipas, during the Mexican war, by the army of the United States, did not make that territory a part of the United States, but as to other nations, while *it was so occupied*, it was deemed a part of the United States. *Fleming v. Page*, 9 How. 603.

In *Livingston v. Jordan*, Chase's Decisions, 454, the Chief Justice says: "The courts of a State forming part of the Confederate States had no jurisdiction, during the civil war, over parties residing in States which adhered to the national government."

This case is important because of its similarity to the present.

A party acting as *prochein ami* for infants, owners of a plantation situate in that State, but who resided in Maryland, filed a petition, in 1861, in the Court of Equity of Sumpter county, South Carolina, where the land was situate, on a contract for the sale of the prop-

Pennywit v. Foote.

erty by such party, and asking for confirmation. The sale was confirmed in March, 1861, and deed was made for the property to the purchaser.

Upon coming of age, and after the war, the infants repudiated the sale, and brought ejectment, and their right to recover turned on the validity of this decree, made on the application of their next friend. This was impeached on two grounds: 1st. That the contract of sale was made without authority to bind them. 2d. That the war suspended the power of the court to bind residents of Maryland.

Upon this last point it is said: "The jurisdiction of the State court over the plaintiff, whatever it was, terminated when the civil war broke out. Upon that point we entertain no doubt. As between parties residing in the State of South Carolina, and parties residing in the States which adhered to the national government, between whom war made intercourse impossible, there could be no jurisdiction in the courts of South Carolina, while the war continued, by which the rights of non-residents could be injuriously affected." While these remarks were not necessary to the decision of that case, they are nevertheless in point as the opinion of an eminent jurist.

Brooke et al. v. Filer et al., 35 Ind. 402, was a bill of review filed in Indiana after the war was over to review a decree made on an original suit commenced in 1861 by the plaintiffs' attorney, in which a decree was rendered *during* the war. The attorney had been employed just before the war by the plaintiff, who resided in Virginia, but who had no knowledge that the suit had been commenced or prosecuted to unsuccessful judgment until after peace was restored. The court say a state of war existed between Virginia and Indiana, and that it was error of law to render judgment; that the court had no legal power to do so. We cite this case in support of the proposition before us, but without assenting to its application to the case before the court of an adhering State. See recent case in 66 Ill.

In *Mosely v. Tuthill*, 45 Ala. 621, the validity of an order of the Probate Court of that State, made in 1863, to sell lands, while the State was under the control of the insurrectionary government, considered.

The court say: "Undoubtedly the court that made the order for this sale *was not a court of a State of the Union.*"

Pennywit v. Foote.

The same view was distinctly announced by Justice WOODBURY, in 1846, in the case of *Scott v. Jones*, 5 How. (S. C.) 343. Speaking of the unauthorized government which had been erected in the territory of Michigan, before the admission of that State into the Union, he says: "Such conduct by bodies situate within our limits, unless by States duly admitted into the Union, would have to be reached either by the power of the Union to put down the insurrection; or by the ordinary penal laws of the States or Territories within which these bodies unlawfully organized are situated and acting; while in that condition their measures are not examinable at all by *writ of error* to this court, *as not being statutes of a State or member of the Union.*"

In Illinois it has been held that a citizen of that State might maintain an attachment against a resident of Alabama during the war, and, if no objection was interposed, proceed to judgment and sale of the property, notwithstanding the war, and that proceedings to condemn land might be had under the same circumstances. *Mixer v. Sibley*, 53 Ill. 61. While this proceeding would be regarded as binding in the State courts of Illinois, it would hardly be recognized in another State, if an action was brought on such a judgment.

Ludlow v. Ramsey, 11 Wall. 581, was an attachment against a defendant, *who had voluntarily left his residence in Tennessee*, where the action was, and for the purpose of engaging in hostilities against the United States, and *for that reason* he could not "be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of inability to return, or to hold communication with the place where the proceedings were conducted."

On the contrary, it was held, in *Dean v. Nelson*, where the defendant was ordered out of the city of Memphis by Union officers, and while within the Confederate lines, proceedings in attachment were had against him. BRADLEY, J., says: "The defendants in the proceedings were within the Confederate lines. Two of them had been expelled the Union lines, and not permitted to return; the other had never left the Confederate lines. A notice directed to them, and published in the newspapers, was an idle form. They could not lawfully see or obey it. As to them the proceedings were wholly void." *Dean v. Nelson*, 10 Wall. (S. C.) 158. See, also, *Don v. Lippmann*, 5 Clarke & Fin. 1.

So in *R. R. Co. v. Trimble*, 10 Wall. 367, a decree in equity in one of the loyal States against a party, who, having been engaged in the rebellion, was a prisoner of war of the United States outside of the State, and against whom there was no service, was held of no effect, and that a sale under it was void.

In *Botts & Darnall v. Crenshaw*, Chase, 224, one of the questions was as to the validity of an order of the Court of Hustings, of Virginia, a court of general equity jurisdiction, made on the application of plaintiff's attorney, during the war, by which the attorney invested his client's money in Confederate bonds. The plaintiffs were resident citizens of Kentucky. Judge CHASE says: "They being citizens of a State adhering to the United States, residing there, this order cannot be recognized by this court, *because it is an act in derogation of the rights of persons beyond the jurisdiction of the de facto government of Virginia of which the court was a constituent part*, and because it is an act the tendency and effect of which was to sustain the course of the Confederate government, and aid in its struggle against the United States."

In the same case it was held that the ordinary relation of attorney and client was not dissolved by the war, and, therefore, that Crenshaw, who was employed before the war to collect a claim in Richmond, Virginia, continued to be plaintiff's attorney during the war for the purpose of making the collection and holding the money, but that his application as such attorney to the court, by which he obtained this order to invest the funds after collection, conferred on the court no power to bind the client, who resided in Kentucky. That in our view of this case, that while defendant's attorney would have continued such, notwithstanding the war, for the purpose of protecting and saving his property and rights, yet he had no power to waive any of his client's rights, as he did, by failing to plead a suspension of proceedings because of the war, much less could he consent that the ultimate rights of his client should be determined by a court which was a constituent part of a *de facto* government, that had no power over citizens of the United States beyond its military lines.

The regular course of justice was interrupted by revolt; the United States courts, post-offices, and other agencies of the general government were closed; its laws were ignored and defied. This new regime had a "boundary marked by a line of bayonets, which

Pennywit v. Foote.

could be crossed only by force." But the public law of the civilized world, the judge, attorneys, officers of the court, and jury, were the enemies of defendants, acknowledging no allegiance to the Constitution and laws of the Union.

All intercourse was forbidden ; all remedies were suspended. "The suspension of the remedy during the war is so absolute that courts of justice will not even grant a commission to take testimony in an enemy's country." *Hanger v. Abbott*, 6 Wall. 532.

It was the duty of the attorney, either to have declined to appear as defendant's attorney, or if he appeared, to have taken the proper steps to suspend the proceedings. His consent to a hearing at the time and under the circumstances was not in the interest of his clients, and clothed the court with no jurisdiction.

Again, by a State of civil war, these defendants became the public enemies of the State of Arkansas and its people, and they were our enemies.

The ordinary rules applicable to all public wars between independent nations would govern in determining the powers of the courts of that State over citizens of other States, conceding to that State authority to prosecute a war against the United States.

Vattel says : "A civil war breaks the bands of society and government, or at least suspends their force and effect ; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge."

In the *Prize Cases*, 2 Black (S. C.), 1, the court says :

"The people of the rebel States were then to be deemed enemies of the people of the loyal States. .

"Several of these States have combined to form a new Confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by a wager of battle. The posts and territory of each of these States are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemy's territory, because it is claimed and held in possession by an organized, hostile and belligerent power. All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on

their government, and are none the less enemies because they are traitors."

It must be borne in mind that we are not considering the validity of this judgment as if it were the act of a court of a State government of the Union, but as the act of a court of an insurrectionary government, that by force has supplanted the lawful government of a State in the Union.

Neither are we seeking to determine the effect of a judgment of a State court against an alien enemy, rendered during hostilities, in the courts of the same State where rendered.

An alien enemy, residing in a State at war with his own State, may be proceeded against, if no objection is interposed, to final judgment, and the courts of such State would treat it as a valid judgment. So perhaps it may, if, after service, he departs the realm before hostilities cease, and returns to his own State; but when that judgment of the foreign State is sought to be enforced by action in his own State, its courts, whose duty it is to protect its own citizens, will treat it as a nullity, because, by the laws of war, the courts of one belligerent have no power over the subjects of the other.

All judicial proceedings as between such enemies are suspended.
"*Silent leges inter arma.*"

But it is said that by the act of 1790 such judgments, when properly authenticated, are to have the same force and effect in the State where sued on as by law or usage they have in the State where rendered; and *Hawkins v. Filkins*, 24 Ark. 286, and other cases cited in same volume, are cited as holding that the judgment of the Circuit Courts of that State during the war were valid.

Filkins v. Hawkins was between citizens residing there during the war. The defendant was served, and the parties, as we understand the case, were both present when judgment was rendered. This judgment might well stand on the principles we have laid down as the act of a *de facto* government over its own citizens within its jurisdiction.

So far as the opinion is based on broader grounds, it is overruled in *Penn v. Tollison*, 26 Ark. 546, and *Thompson v. Mankin*, id. 586, wherein it is held that "the governments established by the States in rebellion were never recognized by the United States as legal State governments," and that "service made during the re-

Pennywit v. Foote.

bellion by a Confederate court is not binding on the party to appear, and any decree or judgment thereon is a nullity."

We have been referred to the cases of *White v. Cannon*, 6 Wall. 443, and *Pepin v. Lachenmeyer*, 45 N. Y. 27, in support of the power of these State courts after secession to render valid judgments.

In *White v. Cannon* the ordinance of secession of the State was passed *January* 26, 1861, and the judgment was rendered *January* 31, 1861, between parties before the court. It was suggested by counsel that the judgment was rendered after the passage of the ordinances of secession, and, therefore, void.

To this, the court say: "That ordinance was an absolute nullity, *and of itself*, alone, neither affected the jurisdiction of that court nor its relation to the appellate power of this court." The mere passage of such ordinance did not abolish the court as a court of the lawful government.

Pepin v. Lachenmeyer related to the validity of a judgment rendered in a State court of Louisiana, in New Orleans, in February, 1863, after the city had been under Federal authority for nearly a year, between resident citizens. The military commander had, on taking possession of the city, in May, 1862, issued a proclamation announcing "that civil causes between party and party will be referred to the ordinary tribunals," under which the State court continued to hear and determine causes. The president's proclamation exempts from its provisions such parts of the insurgent States as became within the Union lines.

Blackwell v. Willard, 65 N. C. 555, is a late case bearing upon the validity of certain judicial proceedings, during the rebellion, in a suit pending prior to the war, wherein a citizen of New York was complainant. Under an order of court, a sale of real estate had been made in November, 1860, on deferred payments. The purchase-money was paid, after the war commenced, to the clerk and master of the court. The court, instead of suspending proceedings in the case, made an order at the fall term, 1861, that the master had authority to receive payment of such deferred payments as the purchaser may desire to pay. It was held that "the relations between the plaintiffs and their counsel were terminated by war, *and the steps taken afterward in the cause* did not affect them. They had a good claim against the defendants before the war began; their remedy was suspended, and was revived on the return of peace." It was further said, the "order of the court after war ex-

isted, and the payment to the clerk and master of the court are no bar to a recovery."

It is said that the appearance of defendant's attorney on the final trial gave the court jurisdiction; that there was no revocation of his authority, and that the war did not work such revocation.

Numerous cases may be cited to show that agencies in private affairs, relating to property of an alien enemy, within the agent's country, so far as their acts are not in violation of the non-intercourse regulations, and are for the benefit of his principal, or protection of his property, are not revoked. We have been referred to none, however, showing that such agencies extend beyond the protection and care of his principal's property and interests, to the creating new obligations. The attorney in this case might well have continued his employment; for the purpose of saving the rights of his clients; but it can hardly be claimed that it was within the scope of his employment to waive his client's right to have the action suspended, and, by his appearance, confer a power upon the court, which otherwise it did not possess, to bind them by a judgment, when war made it impossible for him to have a day in court. If, as we conclude, this court had no power over a citizen of an adhering State, pending the war, the consent of defendant's attorney, under prior employment, could not confer such power.

The judgment of the Superior Court is affirmed.

Judgment affirmed.

SCOTT, C. J., DAY and WRIGHT, JJ., concurred.

ASHBURN, J., dissented.

CONGER V. ATWOOD.

(23 Ohio St. 124.)

Widow — right of, to mansion-house — action against administrator for rents

The right of a widow to remain in the mansion-house of her deceased husband, as provided by statute, is not restricted to a personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the possession of the premises, and may, therefore, either personally occupy them or she may rent them, as she may deem best promotive of her comfort.

Conger v. Atwood.

If the administrator of her husband's estate assumes to control the mansion-house of the decedent, and, denying the widow's right to the possession thereof, rents it to another person, the widow is entitled to the rents received by him during the period she is entitled to remain in the premises.

If the administrator has collected the rents to which the widow is so entitled, and has appropriated them to the payment of debts due from his intestate, she may elect to charge him in either his personal or representative character, and he cannot defeat a recovery by her in an action against him in his representative capacity, on the ground that he is personally liable therefor.

An administrator who, without authority, collects rents of his intestate's real estate, and uses them as assets in paying the debts of the estate, is liable to the party entitled to such rents, and he may recover the amount thereof of the administrator in his representative character.

AMANDA ATWOOD brought an action, in Court of Common Pleas of Summit county, against Arther L. Conger, administrator of Philo Atwood, deceased, and the heirs of said decedent. The petition is as follows :

"The plaintiff says : 1. She is the widow of said Philo Atwood, deceased, who died intestate on the 10th day of March, 1870, seized in fee simple of lot number 10 in block number 28, in the city of Akron, in said county. 2. At the time of his death said lot was, and for some years past before then had been, the homestead and occupied by him as the mansion-house of said Philo Atwood, deceased. 3. The plaintiff's dower in said lot and the real estate of said decedent was assigned to her, as of the rents and profits thereof, on the 25th of November, 1870. 4. The defendant, Arthur L. Conger, was duly appointed administrator of the estate of Philo Atwood, deceased, by the Probate Court of said county, and took upon himself the duties and functions of said trust on the 30th day of March, 1870, and he still continues as such administrator, and said estate is still unsettled, but is fully solvent. 5. The other defendants aforesaid are the children and heirs of said decedent, except said Alonzo Hine, David D. Dressler and Henry M. Montenyohl, who are the husbands of said Sarah J. Hine, Louisa Dressler, and Mary Montenyohl respectively. 6. At the time of the death of said decedent, David D. Dressler, his son-in-law aforesaid, was occupying said mansion-house and lot, under an agreement between them that said decedent should retain his home there, as part consideration for the use and occupation of the premises, and should receive from said Dressler certain rent besides ; and by an understanding between him and said administrator that Dressler should

pay to him a reasonable rent therefor, said use and occupation was continued until the 25th day of July, 1870, or thereabouts. 7. In the month of July, 1870, said administrator collected and received from said David D. Dressler, as rent for said mansion house, due from him to said administrator and accrued after the death of said decedent, ninety dollars, which he paid out on debts due from said estate to the creditors thereof. 8. On or about the 25th day of July, 1870, the said administrator leased said premises to one E. Taylor, for rent, at the rate of twenty-five dollars a month, — upon which lease he collected and received, as rent accruing prior to the 25th of November, 1870, \$95.85, which he has also paid out on debts due from said estate to the creditors thereof; and said rents so collected were no more than the use and occupation of said mansion-house for the time specified were worth. 9. On or about the 16th day of April, 1870, it was agreed between said administrator and the plaintiff, by her attorney, that the administrator should control, lease and collect and receive rents for said premises, and that if she was, by the statute, entitled to occupy said mansion, or to receive pay for the use and occupation thereof, any further or more formal demand for either, so far as he was concerned, was waived, and in consequence the plaintiff made no further demand of said mansion house or rents, or attempted to take possession thereof. 10. By reason of the premises the said several sums of money so collected, received and paid ought, by said administrator, to be paid to the plaintiff out of said estate, and the same is due to her from said administrator."

The petition concludes with a prayer for judgment against the administrator for the amount of said sums of money and interest due thereon.

The defendants demurred to the petition. The court sustained the demurrer and rendered judgment against the plaintiff.

To reverse the judgment of the Court of Common Pleas, the plaintiff below prosecuted a petition in error in the District Court, where the judgment was affirmed as to all the defendants but the administrator, as to whom the judgment was reversed.

The administrator, to reverse the judgment of the District Court against him, prosecuted his petition in error in the Supreme Court.

E. Oviatt, for plaintiff in error.

— *Carpenter*, for defendant in error.

Conger v. Atwood.

DAY, J. The controversy in the case arises upon demurrer to the original petition. The question is, whether the plaintiff below is entitled to recover, of the administrator of her deceased husband, the rents received by him for the mansion-house of her deceased husband, accruing during the year after his death previous to the assignment of her dower, and appropriated by him to the payment of the debts of the decedent. Two leading propositions are involved in the consideration of this question. 1. Was the widow entitled to the rents in question? 2. If so, can she recover of the administrator, in his representative capacity, the rents so received and appropriated by him?

I. The widow's dower was assigned within the year after the death of her husband. She claims the right to the use of his dwelling-house from the time of his death until the assignment of her dower. The first section of the "Act relating to dower" (S. & C. 516) provides that the widow "shall remain in the mansion-house of her husband, free of charge, for one year after his death, if her dower be not sooner assigned to her."

Does the petition show a case entitling her to the benefit of this provision? Some of the averments in the petition are not entirely clear, but no motion having been interposed to make them more definite and certain, we must interpret the petition according to its true import and meaning.

It is averred that the decedent, at the time of his death, owned and occupied the mansion in question. This averment must be kept in mind in connection with the further averment that the house was also then occupied by another person. The two statements are not necessarily inconsistent, nor does the latter invalidate the former. The more essential inquiry is, whether the occupancy of the tenant under the decedent interfered with the right of the widow to the exclusive occupancy of the mansion-house, after the death of her husband?

From the fact that the rent of the tenant was to be paid partly by the occupancy of the decedent, it is fairly inferable that the renting to him was, at most, during the life of the decedent only; and this conclusion becomes incontrovertible, as the case now stands before us, from the fact that after the death of the husband, the tenant continued in the mansion, so far as appears, only under an arrangement made by him with the administrator. Moreover, his occupancy terminated shortly after the death of the

husband, and within the period in controversy. There was then no legal obstacle to the widow's enjoyment of the mansion-house of her husband as provided by the statute.

But it would seem that the administrator of the decedent assumed to control the mansion of his intestate, and denied to the widow the possession of the premises. He cannot, however, defeat a recovery against him by the widow, on the ground that she demanded neither the possession of the mansion-house, nor the rents thereof, for the demand of both was expressly waived by him, if she was entitled to either. Upon this consideration, she abandoned any further attempt to obtain possession of the house, and consented that he might continue to control it, subject to the future determination of her rights. The widow cannot, therefore, be regarded as having abandoned the premises; but, as against the administrator, must be regarded as having been refused both the possession and the rents of the mansion-house of her deceased husband.

But aside from these considerations, what are the rights of the widow under the statute? The provision is for the benefit of the widow for a limited period, between the time of the death of her husband and the assignment of her dower, and it would be an unreasonable limitation to restrict it to a right of personal continuance in the mansion-house merely, and deny to her such reasonable enjoyment of the possession of the premises, as she may deem promotive of her comfort.

This view is in accordance with the weight of authority in other States, in the construction of statutes worded nearly the same as our own, differing only in the period of time the widow is permitted to remain in the mansion-house. *McReynolds v. Counts*, 9 Gratt. 242; *Inge v. Murphy*, 14 Ala. 289; *Oakley v. Oakley*, 30 id. 131; *Shelton v. Carrol*, 16 id. 148; *Stokes v. McAllister*, 2 Mo. 163; *White v. Clark*, 7 Monr. 640; *Hyzer v. Stoker*, 3 B. Monr. 117; *Burk v. Osburn*, 9 id. 579; 2 Scribner on Dower, 59.

In *Inge v. Murphy*, *supra*, the court say: "Having the right of possession by statute, she is entitled to recover the rents and profits, and may hold the premises free from molestation or rent. Nor could it have been the object of the statute to coerce her to remain in person on the premises; or, rather, to make her title depend on that condition; for it may be that she could only derive her support from the premises by renting them; and to hold that the mere removing from the premises defeats this right, might in many in-

Conger v. Atwood.

stances defeat the very intention of the statute which is a provision for the widow until her dower is set apart for her. * * * Mrs. Inge permitted the trustees to enter without objection and rent out the premises, and under their advice moved from them, but no dower was assigned to her, and she has neither released her right to the trustees, nor agreed to do so, so far as we are informed by the record. She is, therefore, entitled to the rents received by the trustees previous to the allotment of dower to her."

We conclude, then, that the plaintiff below, upon the case made in the petition, is entitled to recover the rents in question.

2. The remaining question is, whether she can recover of the administrator in his representative capacity.

This question is not free from difficulty, for it is an undoubted general principle that an administrator cannot bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the intestate.

It is to be borne in mind that in this State the question is not embarrassed by distinctions arising between actions at law and suits in chancery, for whatever rights a party may have are enforceable by the "civil action" of the Code.

The administrator rented the premises and collected the rent, not as the agent of the widow, but, doubtless, upon the supposition that it was his duty as administrator so to do, for he paid the amount collected on the debts due from the estate. It is quite apparent from the petition that whatever was done in relation to the mansion-house by the administrator was understood to be done in the discharge of his official duty. All parties seemed to have acted in good faith under this misapprehension of his powers. The administrator, therefore, regarded the rents as assets of the estate, and used them accordingly. Though not strictly assets, they practically became such by the voluntary act of the administrator. No injustice, therefore, can be done either to him or to the estate by regarding the rents which thus went into the estate as assets. On the contrary, to hold otherwise, and leave the widow solely to such remedy as she may have against the administrator personally, might do great injustice to her, for it is averred that the estate is fully solvent, and the administrator may be personally insolvent. Since, then, both the estate and the administrator in his representative capacity have had the benefit of the rents as assets, the administrator ought to be precluded from defeating a recovery against him as

administrator, on the ground that he is only liable personally *Howard's Adm'r v. Powers*, 6 Ohio, 95 ; *Arbuckle v. Tracy*, 15 id. 432. In *Crowder v. Shackelford*, 35 Miss. 359, it was held that, after the administrator has received rents and paid them in discharge of the debts of the intestate, he will be precluded from alleging that he received them without authority, and must be chargeable as for assets rightfully received. To the same effect are *Terry v. Furguson's Adm'r*, 8 Porter (Ala.), 500, and *Satterwhite v. Littlefield*, 13 S. & M. 302.

In the light of these cases we are constrained to extend to this case, where the rents went into the estate as assets, the principles settled by the Supreme Court of the United States in *De Valengin's Adm'r v. Duffy*, 14 Pet. 290, 291, where it is said: "There are, doubtless, decisions which countenance the doctrine that no action will lie against an executor or administrator in his representative character, except upon some claim or demand which existed against the testator or intestate in his life-time; and that if the claim or demand wholly accrued in the time of the executor or administrator, he is liable therefor only in his personal character. But upon a full consideration of the nature and of the various decisions on this subject, we are of opinion that whatever property or money is lawfully recovered or received by the executor or administrator after the death of his testator or intestate in virtue of his representative character, he holds as assets of the estate ; and he is liable therefor in his representative character to the party who has a good title thereto. In our judgment this, upon principle, must be the true doctrine." And further on the court add: "We do not mean to say that the principal may not in such cases resort to the administrator in his personal character, and charge him *de bonis propriis*, with the amount thus received. We think he may take either course, at his election; but that whenever an executor or administrator, in his representative character, lawfully received money or property, he may be compelled to respond to the party entitled in that character, and shall not be permitted to throw it off after he has received the money in order to defeat the plaintiff's action."

Authorities are not wanting to support the broader equitable right of the widow to recover of the administrator, in his representative character, whether he be regarded as having received the rents as her agent or in his official capacity, for, in either case, when the rents were applied in discharge of the debts of the estate,

Conger v. Atwood.

it was in effect a payment of her money, or by her, to the use of the administrator, as such; and on that ground it is well settled she might maintain an action against him, in his representative character, for money paid to his use as administrator. *Howard's Adm'r v. Powers*, 6 Ohio, 92; *Collins, Adm'r, v. Weiser*, 12 S. & R. 87; *Ashby v. Ashby's Ex'rs*, 7 Barn. & Cress. 444; 2 Will. on Ex'rs, *1509; *Corner v. Shew, Ex.*, 3 Mees. & Wels. 350; *Steel v. McDowell*, 9 S. & M. 193; *Johnson v. Johnson's Adm'r*, Wright's Rep. 594.

In *Peter v. Beverly*, 10 Peters, 532, it was held that if an executor pays a debt of the estate out of his own funds, he becomes a creditor of the estate, and may resort to the trust fund to satisfy his debt. A third party who, through the executor, pays a debt of the estate, is surely equally the creditor of the estate. Accordingly it was said by the court, in *Steel v. McDowell, supra*, that "It is but just that the person making the payment should have the right to look to the fund which the executor holds, and to recover it under a count for money paid to the use of defendant, as executor;" and in *Wall v. Kellogg's Ex'r*, 16 N.Y. 385, it is said: "The estate having received the benefit of the purchase-money paid by Beach, it is equitably chargeable with the sum paid by the plaintiff to protect his interest in the premises." See, also, to the same effect, *Arbuckle v. Tracy, supra*. So Mr. Williams, in his work on Executors (vol. 2, 1509), adopts the language of an English judge, in *Ashby v. Ashby, supra*, as follows: "Again, a plaintiff may, in many cases, have an advantage in proceeding against the assets rather than against the executor personally; the executor in his individual capacity may be insolvent; in his character of executor, he may have assets adequate to answer any claim; and when the money is paid to his use, as executor, justice seems to require that the person who has made the payment should have the liberty of looking to the fund which the executor has in that character."

We concur in regarding this as a just rule, and, therefore, hold, that, upon both reason and authority, the plaintiff below might maintain an action against the administrator in his representative capacity, to recover the rents due to her, which were appropriated by him to the benefit of the estate.

For the reasons already stated, the conclusions at which we have arrived upon the whole case are as follows:

1. The right of a widow to remain in the mansion-house of her deceased husband, as provided by statute, is not restricted to a

Fox v. Reeder.

personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the possession of the premises, and may, therefore, either personally occupy them, or she may rent them, as she may deem best promotive of her comfort.

2. If the administrator of her husband's estate assumes to control the mansion-house of the decedent, and, denying the widow's right to the possession thereof, rents it to another person, the widow is entitled to the rents received by him during the period she is entitled to remain in the premises.

3. If the administrator has collected the rents to which the widow is entitled, and has appropriated them to the payment of debts due from his intestate, she may elect to charge him in either his personal or representative character, and he cannot defeat a recovery by her in an action against him, in his representative capacity, on the ground that he is personally liable therefor.

4. An administrator, who, without authority, collects rents of his intestate's real estate, and uses them as assets in paying the debts of the estate, is liable therefor to the party entitled to the rents, and an action for their recovery may be maintained against him, in his representative character.

It results, so far as any question is made upon the record, that there was no error in the ruling of the District Court; the judgment must, therefore, be affirmed.

ASHBURN, J., dissented.

Judgment affirmed.

FOX V. REEDER.

(38 Ohio St. 121.)

Lis pendens — effect of delay in prosecuting action.

The benefit of the rule relating to *lis pendens* may be lost by such long-continued inaction as amounts to gross negligence in the party prosecuting, when such inaction is to the prejudice of innocent persons.

A mortgage was executed in 1837, upon which bill of foreclosure was filed in 1840, decree taken and order for sale issued in 1842. Save continuances, no further action was had in the case until 1868. In the meantime, the mortgagor, who had remained in open and notorious possession, had sold portions of the premises to innocent purchasers, without actual notice of the pending

Fox v. Reeder.

suit. Such purchasers, and those under whom they claimed, had remained in actual possession more than twenty-one years, when the plaintiff in the foreclosure suit, in 1869, caused to be issued another order of sale. *Held*, that the failure to take any action in the cause from 1842 to 1868, unexplained, was such negligence as prevented an enforcement of the decree against actual purchasers, without actual notice.

ACTION to foreclose a mortgage, executed in 1837 by Reeder, the defendant, to the plaintiff, Fox. The action was commenced in 1840, and a decree of foreclosure and sale was entered in 1842. An order of sale was thereupon issued which was returned stayed by order of the plaintiff. No further proceedings were had in the cause until May 6, 1850, when, according to the transcript, there was a continuance. There were other continuances, until 1854. Save these continuances, there was no other or further action of the parties or court from 1842 to 1868. In 1868 the action was dismissed for want of prosecution, and at the same term the dismissal was set aside, and in 1869, twenty-seven years after the first order of sale, another was issued.

In this condition of things, and to prevent the execution of this order of sale, a number of new parties are made, who file cross-petitions. They allege that they have bought portions of this property, the purchases ranging from 1848 to 1869. It is alleged that Reeder, and those from whom the present holders bought, were in actual, notorious, and uninterrupted possession of the property from 1848 until the filing of the cross-petitions in 1870 and 1871.

Fox & Bird, for plaintiffs in error. On the doctrine of *lis pendens*, cited *Ludlow v. Kidd's Ex'rs*, 3 Ohio, 541; *Bennet v. Williams*, 5 id. 462; *Lessee of Stoddard v. Myers*, 8 id. 203; *Gibbon v. Dougherty*, 10 Ohio St. 365; *Harrington v. Slade*, 22 Barb. 161; *Porter v. Barclay, Wood & Oliver*, 18 Ohio St. 546; *Metcalfe v. Pulvertoft*, 2 Vesey & Beames, 205 (20 Ves., Jr., 204); 11 Ves. 197; *Murray v. Ballou*, 1 Johns. Ch. 573; *Hunter v. Earl of Hopetown*, 4 McQueen H. of L. 972, 981; *Preston v. Tubbin*, 1 Vern. 286; *Gasson v. Donaldson*, 18 B. Monr. 237; *Wickliffe's Ex'rs v. Breckenridge*, 1 Bush, 427; *Debell v. Foxworthy*, 9 B. Monr. 230; *Center v. The P. & M. Bank*, 22 Ala. 743; *Watson v. Wilson*, 2 Dana, 408; *Worsley v. Earl of Scarborough*, 3 Atkyns, 392.

Von Seggern & Glidden, for defendants in error, claimed that the doctrine of *lis pendens* did not apply, and cited Sugden on Ven-

Fox v. Reeder.

dors, 1047; *Preston v. Tubbin*, 1 Vern. 286; *Kinsman v. Kinsman*, 1 Russ. & Mylne, 617; *Murray v. Ballou*, 1 Johns. Ch. 566; *Diamond v. Lawrence Co.*, 37 Penn. St. 353; *French v. Loyal Co.*, 5 Leigh, 627; *Watson v. Wilson*, 2 Dana, 405; *Shevely's Adm'rs v. Jones*, 6 B. Monr. 274; *Clarkson v. Morgan's Devises*, id. 441; *Salter v. Salter*, 6 Bush, 624; *Trimble v. Boothby*, 14 Ohio, 109.

WRIGHT, J. It appears from the case that suit was brought to foreclose the Reeder mortgage in 1842. Practically the case is allowed to slumber until 1868. In the meantime innocent parties purchase the property, without other than constructive notice.

It is claimed by counsel for plaintiff in error, Fox, that there was such a *lis pendens* as to charge all persons with notice.

The general rule on this subject is thus laid down in *Ludlow v. Kidd*, 3 Ohio, 542:

“The principle that the purchaser of the subject-matter of a suit *pendente lite* acquires no interest as against the plaintiff's title, whether legal or equitable, is two well established to be now questioned. Such sale as against the plaintiff is considered a nullity, and he is not bound to take notice of it. The decree of the court binds the property in the hands of such purchaser, although he is no party to the suit, and paid a full price for it, and had, in fact, no notice of the pending of the suit, or the claim of the plaintiff. He is chargeable with constructive notice of the pending of such suit, so as to render his interest in the subject of it liable to its event.”

Other authorities cited by plaintiff in error are to the same effect. With regard to many of them, however, it may be observed that the question arising in this case was not presented. That question is, that to make *lis pendens* available as notice to subsequent innocent purchasers, there must be a close and continuous prosecution of the suit.

For instance, in the case of *Ludlow v. Kidd*, the question decided was that where a bill was dismissed on final hearing and that decree of dismissal reversed on bill of review, purchasers, after dismissal and before bill of review filed, were not *pendente lite* purchasers and were protected.

The court seem to have gone upon the idea that the dismissal ended the case, being a final decree, and “that a final decree is not notice of the matters in controversy.” This view is sustained by

Fox v. Reader.

many authorities. It is the pendency of the suit that creates notice. *Worsely v. Earle of Scarborough*, 3 Atk. 392 ; *Turner v. Crebill*, 1 Ohio, 373.

So in *Bennet's Lessee v. Miah Williams*, 5 Ohio, 461, also cited by counsel for plaintiff in error. The suit was begun by publication. Two weeks after the termination of publication, defendant conveyed the property which was the subject of controversy. This conveyance was held to be *pendente lite*, and amounted to nothing. In such a case it is very evident that no question could arise as to the "close and vigorous prosecution of the suit."

In *Lessee of Stoddard v. Myers*, 8 Ohio, 203, the question was in no way involved, though the case itself shows a prosecution both close and vigorous.

In the case of *Gibbon v. Dougherty*, 10 Ohio St. 365, an action was instituted to subject to the payment of a judgment a debt due from W. to the judgment debtor, after W. was served in the action, the judgment on which it was founded was set aside, and a new one rendered. Between the setting aside of the old and the rendition of the new judgment, W. paid his debt to the judgment debtor. This was held to be a payment *lis pendens*, and did not relieve W. from liability to account. But nowhere in the case does any question of continued prosecution arise.

In *Porter v. Wood & Oliver*, 18 Ohio St. 546, the court does say: as counsel quote : "It is very true that, while property is the subject-matter of a pending litigation, outside parties are bound to take notice of the rights and claims of parties to such litigation." And they also say, in another part of the opinion, that "the doctrine of *lis pendens*, we think, has no application to a case of this kind."

In *Hunter v. The Earl of Hopetown*, 4 McQueen, 972, this is said. "A suit, though asleep, continues *in pendente* till disposed of, and the parties are still at issue, though the *lis* may have been for years comatose."

"An action was commenced in 1845, and a defense lodged. In 1847 the proceedings ceased, and the action became dormant. Held (eighteen years afterward) that the *lis*, though still asleep, was nevertheless *in pendente* and liable to be roused at the volition of either party." But in this case no rights of third parties had intervened to which the principle of *lis pendens* could apply. The remarks of the court applied to plaintiff and defendant, who were

the only parties interested, and, doubtless, as to them the *lis* may be pending so long as the rights of others are not affected thereby.

Counsel for plaintiff in error cite the following as the holding in *Gossom v. Donaldson*, 18 B. Monr. 237: "It is not necessary that a suit should be prosecuted even with ordinary diligence in order to retain the character of a *lis pendens*." Almost that exact language is used by the court, but the remainder of the sentence is, "but as a *lis pendens* is created by the institution of the suit, it can only be lost by unusual and unreasonable negligence of prosecution." There is, therefore, a negligence of prosecution that may interfere with the application of the rule *lis pendens*.

The facts in this case from 18 B. Monr. are quite complicated, but this may be gathered as the action of the court. A *pendente lite* purchaser was held to acquire no rights by his purchase; or, at least any right or title he did acquire was subordinate to that which was invested in the purchaser at the judicial sale in the cause which was the *lis* in question. But at the same time the court held that the purchaser *pendente lite*, having had adverse possession for upwards of twenty-five years, had a good title as against him who purchased at the sale in the very suit to which the principle of *lis pendens* was applied; and this upon the ground that the claim was stale, and not entitled to any favor in a court of equity.

In *Wickliffe's Ex'r v. Breckenridge*, 1 Bush, 427, the proposition is thus laid down: "While the *lis pendens* may be lost by neglecting to prosecute, a reasonable excuse for the delay complained of is always available to keep up the *lis pendens*."

In that case, though the suit had long been pending, the court found sufficient excuse in existing circumstances.

That the position contended for by defendants in error is supported by considerable authority, may be shown.

Sugden on Vendors, in stating the rule on *lis pendens*, adds the qualification: "But the plaintiff must not be guilty of laches in the prosecution of his suit." 2 Sugd. on Vend. 535, 8th Am. Ed.

Sugden cites *Preston v. Tubbin*, 1 Vern. 286. The case says: "When a man is to be affected with a *lis pendens*, there ought to be a close and continued prosecution." *Kinsman v. Kinsman*, 1 Russ. & Mylne, 617.

In *Murray v. Ballou*, 1 Johns. Oh. 566, the effect of *lis pendens* as notice seems to depend upon the fact of a vigorous prosecution.

In *Watson v. Wilson*, 2 Dana, 407, a principal case in Kentucky,

Fox v. Reeder.

Wilson brought suit to subject land of one Benbrook to the payment of a judgment. The land was sold on decree in the case, and Wilson bought it. In the meantime, while this suit was pending, the same land was sold on an execution against Benbrook to a party through whom it came to Watson. Thus there were two parties claiming under judicial sales, and one of these sales was in a suit instituted during the pendency of the other suit.

The rule of *lis pendens* was held not to apply, and the purchaser *pendente lite* held the property, because the first suit had abated by death, and there was a delay of revivor for ten years, which was unexplained. The court say it is proper that a party "should be held to something like reasonable diligence in the prosecution of his suit, to entitle himself to the benefit of the rule." The case discusses the authorities, showing, as the books generally do, that the rule originated with Lord Bacon. It is true that this is a case of abatement and revivor, and there may be a difference between this class of cases where the suit, for a time at least, is at an end and those where no such fact exists.

In *Erhman v. Kendrick*, 1 Metc. (Ky.) 146, suit was brought in 1852 to enforce a mechanic's lien, which was ready for hearing in 1853. In 1856 the lien-debtor mortgaged the property. In 1857 this mortgage was sought to be foreclosed, and the mechanic's lien claimed priority. It was held that this priority was lost, because no action in the suit to enforce it had been taken for four years. The court re-assert the principle that a party who claims the benefit of *lis pendens* as against a *bona fide* purchaser, must show that his suit has been prosecuted with reasonable diligence. The court say: "Public policy, therefore, as well as the legislative intention thus evinced, requires that so far as the rights of third persons are concerned, the lien should be enforced within a reasonable time after the suit for that purpose has been instituted.

"Here the suit was permitted to remain on the docket for four years after it had been prepared for trial, without any decree having been obtained for the enforcement of the lien, and no reason for the delay has been offered. This we deem to be such gross negligence as to deprive the party of all right to its enforcement against the persons claiming under the mortgage."

It will be noticed that this case puts the enforcement of the rule of *lis pendens* upon the question of negligence, that the rule itself, though undoubted, will not be applied where the party has

been negligent to the injury of innocent parties. As Sugden says, in an early edition of his work, the application of the rule may rest upon the question whether or not the party seeking its benefit has been "guilty of laches." 2 Dana, 411.

That the party must use reasonable diligence in the prosecution of his suit is also held in *Clarkson v. Morgan*, 6 B. Monr. 448. The subject is also discussed in *French v. Loyal Co.*, 5 Leigh, 637, and *Diamond v. Lawrence County*, 37 Penn. St. 353.

The case of *Trimble v. Boothby*, 14 Ohio, 109, was a case of abatement by death, and a dormancy of the proceedings for many years. The court recognized as settled the proposition that "to authorize the doctrine of *lis pendens*, the prosecution of the suit must be close and continuous."

It is not necessary for us now to determine upon what principle the rule of *lis pendens* is based. One set of authorities rest it upon the idea of notice—that all the inhabitants of the realm are supposed to pay attention to and be familiar with what is going on in courts of justice, and, having knowledge thereof, cannot interfere therewith by dealing with property already the subject of litigation. Another class of authorities say the foundation of the idea is in public policy. *Bellamy v. Sabine*, 3 Jur. (N. S.) 943. Placing the rule upon either foundation, its benefits may be lost by negligence. As Sugden says, it turns upon the question whether or not the party has been guilty of laches.

We hold, therefore, that though a party may have the benefit of the rule *lis pendens*, yet, as against *bona fide* purchasers without actual notice, that benefit may be lost by such negligence, delays, or laches as are not only culpable in himself, but injurious to others. In the case at bar a decree is rendered in 1842, and, practically, no further action is taken until 1869, a period of twenty-seven years. There is no right of action not barred in twenty-one years, saving disabilities, and it is not the duty of the court to add to the statute, or give parties longer periods than it prescribes. The doctrine of implied or constructive notice, which is an equitable doctrine, does not require, nor does public policy demand it.

Had this suit not intervened, these purchasers might have satisfactorily sheltered themselves under the statute of limitations as against the mortgage. It appears that the mortgagee permitted Reeder to remain in possession. It is alleged, and not denied, that this possession was actual, notorious, continued, exclusive, and ad-

Fox v. Reeder.

verse for a period of more than twenty-one years, and defendants claim this protection.

A mortgage may thus be barred. *Robinson v. Fife*, 3 Ohio St. 551. The suit, however, is begun, and the plaintiffs seek to protect themselves under the rule *lis pendens*. If they seek the application of this rule, they must take it with the liabilities and responsibilities the rule itself imposes. One of these responsibilities is that it must be prosecuted with some such degree of continuity as will manifest signs of vitality. It will not do to allow a suit brought to lapse into quietude for an indefinite series of years, and then claim rights under it as against those who have innocently purchased. The negligence is such that its results must recoil upon the party rather than injure those who have been guilty of no wrong.

As to the property on the east side of Main street, the suit was brought in 1840, and no decree ever taken. If this was a *lis pendens*, the delay in taking no further action is such negligence as prevents action now.

As to the property on the west side, if the decree was a final one, the rule *lis pendens* does not apply. If, upon the other hand, the decree is an interlocutory one, and so merely a step in the *lis pendens*, the failure to take any action for such a long period of time is fatal to the right of recovery. The lapse of time is such that equities become stale, and whether we consider that such lapse raises a presumption of an abandonment of the claim, or that the delay amounts to negligence that may well bar, we hold that under the peculiar circumstances of the case, when the mortgagor has been allowed to remain in possession, dealing with the property for a time longer than would enable the statute of limitations to confer a title, the rights of the mortgagee cannot now be enforced.

Judgment of the District Court affirmed.

LUCHT V. BEHRENS.

Ohio St. 221.)

Executor — carrying on business of decedent — liability of general estate.

Where the executor of an estate, who is not authorized to do so, takes the personal assets of his testator, and uses them in carrying on the former trade and business of the testator for a series of years, for the purpose of making money to be used in paying the debts and supporting the family of the testator, consisting of a widow and minor children, and also for the purpose of keeping up the business for the minor sons when they should be old enough to take charge of it, and in so doing pays off all the debts of the testator, ²*id.*, that the general assets of the testator in the hands of an administrator *de bonis non*, are not liable for money borrowed by the executor for, and used in carrying on such trade and business, though the executor acted in good faith.

The general estate, real and personal, of the testator, not embarked in such business, cannot be subjected to the liabilities incurred in its prosecution in the absence of clear and explicit authority conferred by the will, even though the executor acted in good faith.

When by the will all the estate, real and personal, is devised subject only to the payment of debts, the devisees, as well as the creditors, have an interest in the estate, that cannot be defeated or incumbered by debts contracted by the executor, not authorized by the will.

ACTION by Behrens against the plaintiff in error, as administrator *de bonis non* of one Neulson, deceased, alleging that on the 8th of June, 1867, the estate of Francis Neulson was indebted to him in the sum of \$3,000, on an account stated by and between him and the then executor of said estate, for which he asks judgment.

The answer is a general denial. Upon this issue the case was tried at special term, and on a verdict for the plaintiff, with a motion for a new trial and bill of exceptions, the case was reserved to the general term, when the motion was overruled, and judgment rendered on the verdict.

The errors assigned here, for a reversal of this judgment, are:

1. That the court erred in admitting the evidence of the plaintiff.
2. In refusing to admit evidence on behalf of the defendant.
3. In charging and in refusing to charge the jury as shown by the bill of exceptions.

Lucht v. Behrens.

Herbert Jenney, of *Perry & Jennings*, and *Jacob Schroder*, for plaintiff in error, claimed that an executor who continues the testator's business, without authority, is solely and personally liable for contracts made in such unauthorized business. *Luscomb v. Ballard*, 5 Gray, 404; *Beaty v. Gingles*, 8 Jones' Law, 302; *Chambers v. Robbins*, 28 Conn. 545; in the matter of *Marcus Millenovich*, 5 Nev. 189; *Hailey v. Wheeler*, 4 Jones' Law, 159; id. 161; *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 id. 360; *Stedman v. Feidler*, 20 id. 437; *Fitzhugh v. Fitzhugh*, 11 Gratt. 800; *Sumner v. Williams*, 8 Mass. 162; *Forster v. Fuller*, 6 id. 58; *Badger v. Jones*, 66 N. C. 305.

Henry A. Faber and *Mallon & Coffey*, for defendant in error, claimed that the sole question before the court was simply this: Can an estate successfully resist the collection of money paid to its use and benefit, and solely for the purpose of swelling its profits, and especially when it is not denied that such money was so received and used? and cited 7 Barn. & Cress. 446, 448; 2 Williams on Executors, 1507, 1509, *et seq.*; 15 Ohio 432; 16 Ohio St. 270.

JOHNSON, J. In order to understand the charges given and refused by the court below, as well as to determine their correctness a summary of the facts developed on the trial is necessary.

Francis Neulson died in March, 1863, leaving a will, by which he devised to his wife "all his property, real, personal, and mixed, absolutely and in *fee simple*, so long as she stays a widow and lives, and after her death my children shall divide the property in equal parts among themselves."

He left a widow and several minor children, and under the will his brother, Anthony Neulson, was appointed and qualified as executor, and served as such until 1869, when he resigned, and the plaintiff in error was appointed his successor, to whom the assets, unadministered, were surrendered.

At the time of his death, the testator had been engaged in carrying on a cigar and tobacco store, and owned the stock of goods, valued at about \$7,000, and was possessed of outstanding claims about \$14,000, as well as other property, real and personal, not employed in this business. The estate was largely indebted.

The executor, although not authorized by the will, nor, so far as appears, by the consent of any one interested, carried on the testa-

tor's former business at the old stand, from the testator's death until sometime before his resignation in 1869.

His object in doing so, he says, was : " Firstly, to pay the debts and sustain the family ; and secondly, which was the ultimate object, it was carried on until the boys of my deceased brother should take hold of it themselves." With this object in view he hired one George Voige as manager of the business and placed him in charge of the store, who carried the business on for several years, the same as if the testator was living. The assets of the estate employed at his death in the business, represented by the stock of goods on hand and credits, were used in carrying on this new business. No steps were taken to settle up the estate or administer these assets, as required by the statute.

No distinction was made between the goods on hand or moneys collected from the old business and subsequent purchases or collections. All were used indiscriminately in prosecuting the business for the object stated.

In like manner, out of this common fund, creditors of the estate, and creditors of the business subsequent to testator's death, were paid.

While this was going on and some two years after testator's death, Behrens applied to Voige, the manager at the store, to know if he wanted to borrow some money, saying he had some to spare, if he wanted it. Voige told him he thought he would take it ; that he would see the executor.

Behrens left the money with him, and he deposited it in the bank to the same account as other deposits from the store, giving Behrens credit on the books. When Voige was asked if this money was needed by the *estate* at the time he got it, he says : " We needed money always, to carry on the business as it ought to be carried on ; " and in answer to a question as to how it was used, he says : " It was used to pay off the debts of the estate ; " and when asked what debts, he says : " The general debts of the business. The money was checked out of bank from time to time as we needed it in the progress of business ; " and adds that \$1,500 went to pay for stock.

In the mind of Voige there was no distinction between the debts of the *testator* and those of the *business* ; all were in his mind debts of the estate.

When he was asked if this money of Behrens assisted to make

Lucht v. Behrens.

money for the estate, he says : "It is impossible to make a line there. The business in general made money. * * * Certainly this money must have helped." The whole case shows most conclusively that this money was borrowed for and used in the business. The object of the executor was to keep the business up, and instead of winding up the estate, as required by law, and paying the debts of the testator out of the assets he left, the executor chose to employ these assets in trade and business, and out of the business as it warranted, pay off the debts.

It was to carry out this plan, and while in the course of its execution, that this money was borrowed. It was used in the business, and it is claimed contributed to its success, and that the estate got the benefit of this money ; and as all the creditors of the estate are paid off, the estate is liable whether the business was profitable or not, if the executor acted in good faith.

The right to recover of the estate the money borrowed and used for this object is the real matter in controversy.

It appears that the testator, at his death, owed Behrens some seven hundred dollars, but it further appears that this debt has been paid off, leaving now for consideration the liability of the estate as to the money borrowed after his death and used in the business.

On the trial, the court admitted evidence in behalf of defendant in error, tending to show that the business was profitable, but refused to allow the plaintiff in error to show the contrary, on the ground that it was an immaterial issue, provided the business was conducted in good faith by the executor. This is assigned as for error. The other errors arise on the charges of the court. These charges relate to two aspects of the case :

1. As to the liability of the estate for money borrowed by the executor and used directly in payment of debts of the estate, by which we mean debts of the testator.

2. As to such liability for money advanced and used to carry on the business by the executor, after the testator's death, out of which business the debts were paid.

1. As to the liability of the estate under the first aspect of the case, the charges in effect were, that if the executor in good faith borrowed money and used it in the payment of the debts, the estate was liable to refund.

Whether this proposition is sound law we do not find it necessary

Lucht v. Behrens.

now to determine. This money was borrowed and used in the business of the executor in carrying on the store, and not directly to pay the debts.

No attempt was made to wind up the estate, nor was the money loaned to enable the executor to do so, but to prosecute the business. Behrens, by making this loan, did not become a creditor of the *estate*, but of the *executor*, with whatever rights he may have had, if any, in equity, to charge the property embarked in the business with his claim.

2. As to the second aspect of the case :

In substance, the rulings of the court amount to this : That if the executor acted in good faith in carrying on this business with the assets, and from time to time drew out means and paid the debts of the testator, and turned the residue of the business over to the estate, it is liable for debts contracted by him in so doing, whether the business was profitable or otherwise.

In short, if the liabilities so incurred exhausted the assets employed in the business, the new creditors could resort to the general assets.

In so holding the court below lays stress on the fact that all the creditors of the testator have been paid off, and that the contention, therefore, is only between Behrens and the estate, and if, in course of the business, the estate has been benefited, it is liable to its creditors. In this the fact is lost sight of that in refusing to allow defendant below to show that the business was unprofitable, that is, that the estate had not in fact been benefited, the court held that that was an immaterial issue, provided the executor acted in good faith.

The unqualified doctrine is thus announced : That if an executor in good faith continues the business of his testator, without authority, for the purpose of paying his debts, supporting the family, and preserving the good-will and business for the minor children when they shall grow up, and in so doing incurs liabilities, the rest of the testator's estate not embarked in the business is liable if all the creditors of the estate have been paid.

This, if true, would make liabilities so incurred a charge on the testator's other estate not so embarked in the business, and might defeat the disposition of property made by the will.

It is a part of this case that the executor prosecuted this busi-

Lucht v. Behrens.

ness, not only without authority of law, but without the consent of any one interested.

Neither the widow for herself, nor as the guardian of her minor children, attempted to clothe him with any power to create debts which would affect them or the estate devised to them.

It will not be disputed that if this judgment is allowed to stand, and it turns out that the personal assets are insufficient to pay it (and as to that we are not advised), the real estate may be resorted to for that purpose.

By the will this real estate is devised to his wife while she lives and remains his widow, and after that equally to his children, thus vesting them with an estate liable for the payment of the judgment in this case. It thus appears that upon the theory of the court below the entire estate of the widow and heirs, outside of that embarked in the business by the executor, is, without authority of law or authority conferred by the will, made subject to all the perils and hazards of the undertaking.

It has long been well settled that :

“Contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered or goods or property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator.” *Austin v. Monroe*, 47 N. Y. 360. It is equally well settled that executors, in the absence of power conferred by the will, have no authority to carry on the trade or business of their testator, and that :

“The employment of the trust funds in trade, or any speculative undertaking, without an express authority, will, *a fortiori*, be treated as a breach of trust ; and whatever may be the apparent advantages of such a course, and however well-intentioned the conduct of the trustee, there is no question but that the court will

visit upon him any loss resulting from such a step, while he will have to account for any profit thus made." Williams on Ex'rs, 1274 ; Hill on Trustees, 379 ; Perry on Trusts, § 429.

So rigid is this rule, and so careful have the courts always been to guard against the perilous consequences resulting from embarking the assets in trade, that, even when the will authorizes the executor to carry on the business, he cannot in so doing create liabilities against the general estate, but the creditor of such new business must look either to the business itself or to the executor individually for his pay.

In the leading case on this subject, *Ex parte Garland*, 10 Ves. Jr. 109, the testator devised his personal and leasehold estate in trust, to permit his wife to receive the rents and profits during her life for her own use and for the support and maintenance of his minor children, and after her death to the children ; and then directed that his trade as a miller and his farming business be carried on until the trustees should think proper to establish his sons. His wife was one of the executors, and, as directed by the will, carried on the business until she became a bankrupt.

The action was brought to charge the testator's other estate, not employed in the business with its debts.

Lord ELDON said that this could not be done ; that it would be intolerable to hold that every legatee is to hold his legacy subject to the venture in business which he can not control, and which may cut down all his hopes, as far as they are founded on the receipt of that bounty. He adds that, on the other hand, speaking of the executor: "He becomes personally responsible, though but a trustee." Again, in speaking of those who are creditors, not of the testator, but subsequent to his death, he says: "In the first place, they may determine whether they will be creditors; next, it is admitted, they have the whole fund that is embarked in the trade; and, in addition, they have the personal responsibility of the individual with whom they deal. * * * They have something very like a lien upon the estate embarked in the trade. They have not a lien on any thing else."

He concludes by saying that the convenience of mankind requires him to hold that the creditors of the trade as such have no claim against the distributed assets, not embarked, and cannot resort to the general assets.

In *Burwell v. Mandeville*, 2 How. (N. S.) 560, when the same

Lucht v. Behrens.

question was before the court, it is said: "Nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in the trade, would justify the court in arriving at the conclusion, from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payment may all be recalled, if the trade should be unsuccessful or ruinous."

In the case at bar, the testator disposed of all his estate, subject only to the payment of his debts, the funeral expenses, and costs of administration. No other liabilities incurred by the executor, however honestly incurred, can be made a burden on this bounty to his wife and minor children.

The doctrine of the cases just cited is supported by numerous authorities, and may be regarded as well established. *Richardson v. Hodgson*, 3 Madd. 138; *Pitkin v. Pitkin*, 7 Conn. 307; *Scholesfield v. Eichelberger*, 7 Pet. 586; *Laughlin v. Lorenz*, 48 Pa. 275; *Davis v. Christian*, 15 Gratt. 11; *Stanwood v. Owen*, 14 Gray, 195.

Numerous cases have been cited and relied on to show that there are exceptions to the general rule, as to the liability of the estate for the contracts of the personal representative.

In *Cable v. Alword*, 27 Ohio St. 654, decided by us at the last term, it was held that when there was a controversy between the widow and the administrator as to her title to the rents of the mansion-house due from the tenant within the year, and the administrator, acting in good faith, collects these rents, and applies them to the payment of debts of a solvent estate, he was liable in his representative capacity to refund to the person entitled to collect them.

This case goes quite far enough, but it is supported by a strong equity as well as by authority.

In *De Vallengin's Adm'r v. Duffey*, 14 Peters, 282, it was said "that whatever property or money was lawfully received by the executor, in his representative character, *he holds as assets of the estate*, and he is liable in that character to the party who has a good title thereto."

"So if an executor or administrator out of his own funds pays

a debt, he becomes a creditor, and may resort to the trust fund to satisfy it." *Peter v. Beverly*, 10 Peters, 582.

In *Arbuckle's Ex'r v. Tracy*, 15 Ohio, 432, the executor of a surety on a note, acting in his representative character, received sundry collaterals to protect his testator's estate from liability on the suretyship, and it was said if such executor had collected money on the collaterals, and applied them to the benefit of the estate, it would be liable, but it was not liable for conversion of these collaterals by the executor.

To allow personal representatives of estates to go beyond this, and without authority of law, or under the will, embark the assets of an estate in trade or business, however well intentioned they may be, and thereby subject the estate to all the hazards of the venture, would encourage that which it has been the especial policy of the law to prevent — the employment of trust property in any other mode than is clearly authorized.

For aught we know (for the court refused to hear evidence on the subject from the defendant), this well-meant endeavor to preserve the business of the testator for his sons, while paying the debts and supporting the family out of it, may have been disastrous; and if this judgment stands and is collected, it may defeat the express provisions of the will. If this and like claims are allowed, it may exhaust both real and personal estate to pay them, leaving nothing to the devisees under the will.

These devisees have had no voice or control in this undertaking, and their interests are proper objects of protection, as well as those of creditors of the estate. As between them and one who lends his money to carry on this unauthorized business, there can be no question that their rights in the estate not embarked in the business are paramount.

Judgment reversed and cause remanded.

Harvey v. Childs.

HARVEY V. CHILDS.

(33 Ohio St. 319.)

Partnership — what constitutes.

The liability of one partner for the contracts of another, when not estopped from denying the liability, is founded on the relation they sustain of being each principal and agent in the joint business. That relation is, therefore, the true test of a partnership, and the liability rests on the ground that it was incurred on the express or implied authority of the party sought to be charged.

Participation in the profits of a business, though cogent evidence of a partnership, is not necessarily decisive of the question. The evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the other.*

ACTION for money. The case is sufficiently stated in the opinion of the court.

Matson & Dirlam, for plaintiff in error.

Brinkerhoff & Dickey, for defendants in error.

DAY, J. The original action was brought by Harvey against Childs and Potter, to recover \$158.40, for seventeen hogs sold by Harvey to Potter.

Potter is in default. Childs denies his liability. His liability is claimed solely on the ground that he was a partner of Potter in the adventure for which the hogs were purchased.

The partnership claimed rests on the following state of facts: Potter went to Childs, and told him that he had contracted for about two car loads of hogs, to be delivered at Loudonville the next day, and had not the money to pay for them. He asked Childs to advance the money and take an interest in the hogs. Childs refused. Thereupon Potter proposed that if he would let him have the money to enable him to pay for the hogs he had bought, and others he might have to buy to make the two car loads, he (Childs) should take possession of the hogs when carried at Loudonville, as security for the money, take them to Pittsburg, sell them, and take his

* See a very elaborate examination of this question in *Eastman v. Clark*, 10 Am. Rep. 192. See, also, *Leggett v. Hyde*, 17 id. 244.

Harvey v. Childs.

pay from the proceeds of the sale ; that he might have one-half the net profits of the adventure, and that in no event should Childs sustain any loss, but the money advanced by him should be fully paid by Potter in case the amount realized from the sale of the hogs was insufficient. Childs accepted the proposition, and, it being agreed that \$2,500 would be enough to pay for the two car loads he advanced that sum to Potter. Afterward, without the knowledge of Childs, Potter bought the hogs in question of Harvey, on his own credit, and they made part of the two car loads of hogs which were taken possession of by Childs, sold in Pittsburgh, and the avails of the sale were appropriated in payment of the money advanced by him. No profits were made. The avails of the sale were insufficient to pay the amount advanced by Childs, and Potter paid him the deficiency, and for his time and expenses in the transaction.

The question to be considered, then, is, are the defendants, by construction of law, to be regarded partners as to the plaintiff, being a third person, in the debt incurred to him by Potter in his own name ?

What shall be regarded, as to third persons, a test of partnership between parties who did not consider themselves to be partners, and who have done nothing to estop them from denying that they are such, has been much discussed by courts and elementary writers, and the problem seems to be one of difficult solution. It is needless to review here the numerous cases on the subject ; a statement of results is sufficient.

No little difficulty has been experienced in determining the meaning and limits of phrases that have been recognized as tests of a partnership in such cases, and in their application to the varying cases that arise.

The effort has been to draw a distinct line between cases where one has a community of interest in the profits of a business, as distinguished from those where one is entitled to receive a sum of money out of the profits as a creditor, or a sum proportioned to a *quantum* of profits, or a share of the profits as a compensation for services or labor.

Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another is the relation they sustain to each other, as being each principal and agent. That relation, it

Harvey v. Childs.

would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation that the joint liability was incurred on the express or implied authority of the party sought to be charged.

But if the relation of principal and agent be regarded as the test of a partnership and consequent joint liability, the question still remains, what shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question?

To this end numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as a principal or proprietor. Pars. on Part. 71, and note; Coll. on Part., §§ 25, 44. See, also, Story on Part., §§ 36, 38, 60; *Berthold v. Goldsmith*, 24 How. 536.

But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, cannot be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who cannot be said to be acting, in the particular transaction, as the agent or on behalf of the party sought to be charged. Therefore, on principle, the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for when they sustained that relation, a joint liability may be said to have been incurred by the authority, or on behalf of each of the parties so related. The tendency of the more modern authorities, both English and American, is to this conclusion.

The case of *Cox v. Hickman*, decided by the House of Lords in 1860, has become a leading case on the subject. 99 E. C. L. 47; 8 House of Lords Cases, 268. It is summarized in the subsequent case of *Bullen v. Sharp*, 1 Law Reporter, 112, by BLACKBURN, J., as follows: "I think that the *ratio decidendi* is that the proposition laid down in *Waugh v. Carner*, viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord CRANWORTH, whether

the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining the question, but not being in itself decisive; the test being, in the language of Lord WENSLYDALE, whether it is such a participation in the profits as to constitute the relation of *principal and agent* between the person taking the profits and those actually carrying on the business." Add. on Cont. 168.

These cases were decided before the passage of the act of parliament in relation to partnerships. But, so far as relates to this question, in a subsequent case, BRAMWELL, J., declared, in effect, that the act was only declaratory of the common law, as held in *Cox v. Hickman*. *Holme v. Hammond*, 7 Law, 218-236.

The question was much considered in *Eastman v. Clark*, 53 N. H. 276, where the authorities are fully collated and ably reviewed. The case was decided in 1872. The conclusion arrived at is stated by SMITH, J., as follows: "The real ultimate question in all cases like the present is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of the question,' except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business.' Whether such relation actually existed is a question of fact. Upon the trial of that question, proof of a right to participate in the profits would be a cogent and often practically conclusive piece of evidence to establish the existence of that relation; but there is no sound foundation for an arbitrary rule of law requiring courts or jurors to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts."

In the absence of any known stipulation to the contrary, every party of a trading firm, within the scope of the joint business, in contemplation of law, is clothed with implied authority to enter into simple contracts on behalf of the firm in furtherance of the business of the partnership, and thereby bind each member of the firm. Where, therefore, as in the case of *Wood v. Vallette*, 7 Ohio St. 172, and in the later case of *Leggett v. Hyde*, 58 N. Y. 272, money is advanced, to be used in a trading business, and returned in a year with a share of the profits made during that time, it may well be implied that the business was conducted on behalf and by

Harvey v. Childs.

the authority of the person advancing the money and sharing the profits, for it is to the continuing trade, in the ordinary way, that he looks for his profits.

But such cases are plainly distinguishable from one where money is advanced, to be embarked in a single transaction, where no credit is contemplated. In such case there is no ground for the implied authority to incur debts, such as exists in regard to a general trading business. Add. on Cont. 161.

In the case before us it is obvious that it was not contemplated in the arrangement between Childs and Potter that any indebtedness should be incurred in the purchase of hogs for the contemplated adventure, to which the whole business was to be confined. There is, then, no ground for the implication of authority from Childs to incur the debt in question. On the contrary, such implication is rebutted by the advancement of money to pay for all the hogs that were to come to his hands.

Moreover, Childs had no legal interest in any of the hogs until they were delivered to him at the cars, nor had he any equitable interest in hogs, before such delivery, that were bought by Potter and not paid for by money received from Childs. He had, then, no interest whatever in the hogs bought of Harvey on credit, when the debt to him was incurred; and Potter, before delivery to Childs, might have sold them without being liable to account to Childs. The fact is apparent that it was the understanding of the parties that Potter had bought for himself, and, if need be, was in like manner to buy enough more hogs to make two carloads; and it cannot be doubted that, until their delivery at least, all the hogs belonged to Potter alone, and at most were only regarded as his contribution to the enterprise. If so regarded, the case is like that of *Wilson v. Whitehead*, 10 M. & W. 503, where it was agreed between three parties that one should edit, another print, and the other publish a paper, and share equally in the net profits. The printer was to furnish the paper and charge the firm at cost prices. It was held that the printer alone was liable to the person of whom he bought the paper. PARKE, B., said: "The question is, did the other defendants authorize Whitehead to purchase the paper on their account or on his own? It appears to me, on the true construction of the contract, that the latter was the case. When the paper was in his possession he was at liberty to have appropriated it to any other purpose."

Harvey v. Childs.

But the truth is, Potter was the owner of the hogs until they were sold by Childs; for Childs declined to take any interest in the hogs other than as security for the money advanced by him to Potter. Looking to the whole matter, it is clear that the transaction was a loan of money by one party to the other, on the security afforded by the possession of the hogs. Childs, therefore, was the mere pledgee of the hogs, with a power of sale by agreement of the parties, and, as such, had only special property in the hogs. The general property in the hogs, from first to last, remained in Potter. He was the owner, and if they had died on the way to market, without the fault of Childs, the loss would have fallen upon Potter, both by the positive agreement of the parties, and the legal effect of the transaction between them as bailor and bailee.

There was, then, strictly speaking, no mutuality or community of interest between them in the hogs. Childs had no interest in them other than as security for a debt, and to find in half the profits of their sale the measure of his reward for the use of his money, to be paid out of Potter's property.

The relation of the parties was that of debtor and creditor, of bailor and bailee, and not that of partners. They had no mutual interest in the hogs in common as principals or proprietors, nor was either acting as principal for himself and agent for the other. If, however, that relation could be said to exist after the hogs were delivered to Childs, there is no ground for an inference that the debt to Harvey, previously contracted by Potter, was incurred upon the authority of Childs. On the contrary, the facts rebut any implication of such authority, and are consistent only with the supposition that the debt was incurred without authority from Childs, who was doubtless no less surprised to learn of the debt than Harvey was, after the failure of Potter, to find the existence of a rule of law under which he had unwittingly given credit to another and responsible party. We may, in conclusion, therefore, well adopt in this case the language of Judge STORY (Part., sec. 36): "Now, it is incumbent upon those who insist that a partnership exists between the parties, as to third persons, by mere operation of law, in opposition to their own intention, to establish that in the given case, under all the circumstances, there is such a rule, and that it is strictly applicable."

This disposes of the material question made by the record. The court of common pleas gave judgment in favor of the plaintiff.

Ferrell v. Maxwell.

against both Childs and Potter. The District Court, on error reversed the judgment as to Childs. It follows that the judgment of the District Court must be affirmed.

Judgment accordingly.

FERRELL V. MAXWELL.

(28 Ohio St. 333.)

Statute of frauds—verbal promise of indemnity to a surety.

A promise of indemnity by one not a party to an obligation to induce another to become surety thereon, being a promise to answer for the default of another person, if not in writing, is void under the statute of frauds.

But if a surety on an obligation, upon his promise of indemnity, procures another to become surety with him on the same instrument, the promise is not within the statute, for the indemnity promised is to secure his own default.*

A surety on an administration bond, by his agreement of indemnity, induced another to sign the same bond as surety with him. *Held*, that the agreement, though not in writing, was valid and binding as between the parties to the agreement.

ACTION by Maxwell against Thomas Ferrell on an agreement by the latter to indemnify the former for going surety with him on the bond of an administrator. The plaintiff recovered judgment and the defendant prosecuted his petition in the Supreme Court to reverse the judgments of the court below.

The finding of facts was substantially as follows :

John N. Ferrell, August, 1863, was appointed administrator of John McBeth, deceased, and gave bond in the sum of \$3,000, with the plaintiff and defendant and others as his sureties.

After the defendant had himself consented to become one of the sureties on the bond, defendant applied to the plaintiff to become a surety on the bond with him, and to induce the plaintiff to do so, promised that if he would become such surety with him he would indemnify and save him harmless from all loss and damage that might happen to him by reason of becoming such surety ; and

* See *Contra Biscoe v. Britton* (59 Mo. 204) ; 21 Am. Rep. 379.

the plaintiff, by reason of such promise, and relying thereon, consented to become one of the sureties on the bond.

The agreement of the defendant was not evidenced by writing.

After the plaintiff had consented to become surety on the bond, it was signed by said John N. Ferrell, who then took it to the plaintiff to be signed by him, in accordance with his promise to the defendant, and who then relying on the said promise of the defendant to save him harmless, and also sign the bond himself as surety, did sign said bond as one of the sureties thereon; and the bond was then taken by said John N. Ferrell to the other sureties and to the defendant, and was signed by them and the defendant, and the probate judge accepted and approved the same.

Afterward, by reason of the neglect and default of the said John N. Ferrell in not paying over the balance of the moneys of said estate found to be in his hands on final settlement as such administrator, a suit was brought on the bond by the heirs of said John McBeth against said plaintiff and the other signers of the same.

None of the defendants in the suit were or are solvent, except the plaintiff and defendant and the estate of John C. Dunlavy, deceased, represented by David Chalfant, administrator of said estate; and the defendant, having before judgment settled with and paid said heirs his one-third of the amount claimed in said suit and costs, was discharged, and judgment was rendered in the action against said Walter C. Maxwell and against said David Chalfant, as administrator of the estate of Dunlavy, for the sum of \$895.47, and for costs, amounting to \$23.20, all of which remains unpaid.

On these facts the court held, as matter of law, that Thomas Ferrell was liable, and rendered judgment in favor of Maxwell against him, that he pay one-half of the judgment so rendered against Maxwell.

Lewis Lewton, for plaintiff in error, claimed that the promise of the plaintiff in error was clearly within the statute of frauds and void, and cited 1 Saund. 211c; *Greeg v. Creswell*, 10 Adol & Ellis, 489; *Easter v. White*, 12 Ohio St. 219; *Kelsey v. Hibbs*, 13 id. 340; *Goodman v. Chase*, 1 B. & Ald. 297; *Matson v. Warham*, 2 Durnford & East, 80; *Buckmeyer v. Darnell*, 2 Ld. Raym. 1085; *Nelson v. Boynton*, 3 Metc. 396; *Loomis v. Newhall*, 15 Pick. 159; *Kirkham v. Marter*, 2 B. & Ald. 613; *Wing v. Terry*, 5 Hill, 160, *Carville v. Crane*, 5 id. 483; *Kingsley v. Balcome*, 1 Barb. 131, *Broom on Frauds*, §§ 153-180.

Ferrell v. Maxwell.

There is a class of cases, where the object of the promisor and the effect of the act of the promisee is to subserve some purpose personal to the promisor, or to secure to him some benefit or advantage he could not otherwise enjoy, that are held not to fall within the statute. *Williams v. Leeper*, 3 Burr.; *Casting v. Aubert*, 2 East; *Barrall v. Trussell*, 4 Taunt. 117; *Browning v. Stallard*, 5 Taunt. 450, and many others are examples of this class. See Roberts on Frauds, 232. But the signing of this bond was in no respect a benefit or accommodation to the promisor, but was for the sole benefit and accommodation of the administrator; nor was the promise one to indemnify the defendant in error against any default of the plaintiff in error, but was a promise to indemnify against answering for a default of the administrator.

J. M. Estep, for defendant in error. It is claimed by the plaintiff in error that his promise of indemnity is not binding on him by reason of the statute of frauds.

But here *both* Ferrell and Maxwell have signed the bond for John N. Ferrell, and the authorities are clear that we have the right to show the *relation* between the signers of the instrument by parol—who are principals and who sureties. *Barry v. Ransom*, 2 Kern 462; 1 Smith's L. C. 479 (6 American ed.)

If this contract was made in parol, as alleged and found by the court, Ferrell become a *principal* as to Maxwell, and no contribution could be claimed of Maxwell in case Ferrell paid the debt.

One may be a surety for a surety. 1 Lead. Cas. in Eq. 162, 169, (3 American ed.); 1 Story's Eq., § 498; 12 Mass. 98; *Harris v. Warner*, 13 Wend. 400; 1 Smith's L. C. 479 (6 American ed.)

Now, in this case Thomas Ferrell is bound in writing to pay this debt in default of the administrator of John N. Ferrell. I believe no case can be found, where both sureties signed the obligation, holding that the agreement of the one to indemnify the other must be in writing. *Thomas v. Cook*, 15 Eng. Com. Law, 333; *Barry v. Ransom*, 2 Kern. 492; 1 Smith's L. C. 478, 479; *Blake v. Cole*, 25 Pick. 97.

"Sureties are entitled to come into equity after the debt is due, to compel the principal to *pay* the debt and exonerate them from liability." 1 Story's Eq., §§ 327, 499, 639, 730; 4 Kent's Com. 563; 4 Ohio St. 600.

Farrell v. Maxwell.

I think, therefore, that the agreement of Thomas Ferrell to save Maxwell harmless, was valid and binding, and should be enforced, and that the judgment of the District Court was correct and proper.

DAY, C. J. It is claimed by the plaintiff in error that the agreement of indemnity on which the action was founded, not being in writing, is void under the statute of frauds. The question, then, is whether the agreement is a "special promise to answer for the debt, default, or miscarriage of another person," within the meaning of the fifth section of that act?

It is undoubtedly settled law that if a person signs an obligation as surety upon a promise of indemnity by one not bound by the same instrument, the promise is within the statute, as being a promise to answer for the default of the principal upon his implied liability to his surety. *Easter v. White*, 12 Ohio St. 219; *Kelsey v. Hibbs*, 13 id. 340.

But it is equally well settled that if a surety on an obligation, upon his promise of indemnity, procures another to go surety with him on the same instrument, the promise is not within the statute for the indemnity promised is to secure his own default. *Oldham v. Broome*, ante, 41.

Recognizing this distinction, upon a review of the cases, the result of the authorities on the question is stated in 1 Smith's Leading Cases (7 Am. ed.), 511, as follows: "A promise by a stranger to the debt, to indemnify a surety is *prima facie* within the statute, because the principal is bound by an implied obligation to do that which the promisor agrees to do expressly, and the promise is, therefore, really to answer for the default of the principal. When, however, the promisor is directly or indirectly answerable for the debt independently of the promise, any engagement which he may make, that it shall be paid, or that the surety shall not be compelled to pay it, will be regarded as contracted on his own behalf, and not for the debt or default of another, in the sense in which the term is used in the statute."

In the case before us, Maxwell became surety on the bond, relying on the promised indemnity of the plaintiff in error, who, as he agreed to do, also signed the bond as surety. The case, then, falls into the class where the promisor is liable for the debt independently of the promise in question; his engagement to indemnify Maxwell must, therefore, be regarded as having been entered into on

Steamer Petrel v. Dumont.

his own behalf, and not for the debt or default of another, within the meaning of the statute.

It results, from this view of the case, that the judgment of the court below must be affirmed.

Decree affirmed.

STEAMER PETREL v. DUMONT.

(28 Ohio St. 602.)

Jurisdiction — admiralty contracts — repairs to a boat in her home port.

The Ohio river being a navigable river of the United States, not connected with the lakes, under the judiciary act of 1789, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction arising thereon is vested in the District Courts of the United States, saving to suitors, however, in all cases, a common-law remedy, where the common law is competent to give it.

Contracts for repairs or supplies furnished to a boat or vessel at her home port are maritime contracts, and, therefore, come within the admiralty jurisdiction of the United States District Courts. But contracts for boat or ship-building are not maritime contracts, and, therefore, do not fall within that jurisdiction.

The test of admiralty jurisdiction, under the act of 1789, is the nature of the claim on which the suit is founded, and is not the form of remedy resorted to. When the claim is maritime, it comes within that jurisdiction exclusively, excepting only the right of suitors to pursue common-law remedies, or what is equivalent thereto in other courts.

A suit by a proceeding *in rem* against a boat or other craft, under the watercraft law of this State, for the breach of a maritime contract, is not a common-law remedy, within the meaning of the saving to suitors of such remedies by the act of 1789.

A suit *in rem*, under the watercraft law of this State, on a claim for repairs or supplies to a boat or craft navigating the Ohio river, is not a mere proceeding to enforce a lien, but it is also a civil action, founded on a contract; and when the claim is a maritime contract, the proceeding *in rem* cannot be resorted to in the State court, for upon such contracts that remedy is, by the Constitution and laws of the United States, vested exclusively in the United States District Court.

No maritime lien arises on a contract for repairs or supplies furnished to a boat or vessel in her home port; therefore it is competent for the States in such cases, to create liens therefor, and to provide remedies for their

Steamer Petrel v. Dumont.

enforcement not inconsistent with the exclusive jurisdiction of the admiralty courts.

The lien given by the watercraft law of the State on contracts for repairs or supplies to a domestic boat or craft, engaged in inter-State commerce on the Ohio river, cannot be enforced by a proceeding *in rem* against the boat or craft in the State court; for that proceeding, in such cases, is within the exclusive jurisdiction of the United States District Court.

PROCEEDING *in rem* to recover for repairs of a steamboat.
The opinion states the case.

Lincoln, Smith & Stephens, for plaintiffs in error.

A. B. Huston, for defendant in error.

DAY, Ch. Je. The original case was brought, by a proceeding *in rem*, under the watercraft law of the state, in the Superior Court of Cincinnati, by Dumont against the Steamboat Petrel, by name, to recover for repairs at Cincinnati, her home port, charged to the boat, which was engaged in inter-state commerce on the Ohio river.

Judgment was rendered against the boat, and this petition in error is prosecuted to reverse the judgment, for want of jurisdiction in the State court, to proceed *in rem* against the boat.

That the Ohio is a navigable river, to which the admiralty jurisdiction of the United States courts extends, can not now be questioned; nor can it be disputed that such jurisdiction of that river is controlled by the judiciary act of 1789. These points were settled in *The Steamboat Gen. Buell v. Long*, 18 Ohio St. 521, upon the authority of the decisions of the Supreme Court of the United States.

It is claimed, on the part of the plaintiff in error, that, under the act of 1789, the United States District Court, as a court of admiralty, has exclusive cognizance of proceedings *in rem* for repairs and supplies to a vessel engaged in commerce, though they are furnished in her home port.

On the part of the defendant in error, it is claimed: 1. That a contract for repairs or supplies of a vessel in her home port is not a maritime contract, and, therefore, not within the admiralty jurisdiction. 2. If it be regarded as a maritime contract, that no maritime lien arises thereon, and, therefore, the enforcement of a State lien, by a proceeding *in rem* in the State court, authorized by a

Steamer Petrel v. Dumont.

State law, is no encroachment upon the admiralty jurisdiction of the federal courts.

The first question, then, to be determined, is, whether contracts for repairs and supplies furnished to a vessel, at her home port, are maritime contracts; for, if not, like contracts for ship-building, they do not come within the admiralty jurisdiction, and, therefore, no question of conflicting jurisdiction can arise. *Scow Tuttle v. Buck*, 23 Ohio St. 565; S. C., 13 Am. Rep., 270; *People's Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 id. 129.

Undoubtedly numerous cases, and such that may be found in the text-books, tend to show that contracts for repairs and supplies at the home port are contracts "made on land to be performed on land," and cannot, therefore, be regarded as maritime contracts. *Williamson v. Hogan*, 46 Ill. 504; *Boylan v. Steamer Victory*, 40 Miss. 244; *Cavender v. Steamer Fanny Barker*, id. 235; *Southern Dry-Dock Co. v. Gibson*, 22 La. Ann. 623.

But the Supreme Court of the United States is the ultimate tribunal on questions pertaining to admiralty jurisdiction; resort must, therefore, be had to the decisions of that court for the determination of this and all other questions relating to that jurisdiction.

That court has long recognized contracts for repairs and supplies to vessels in the home port as maritime contracts, and sustains the admiralty jurisdiction over them; but (though not without dispute) it holds that no *maritimelien* arises thereon. It must, therefore, be regarded as settled law, that such contracts are maritime contracts, though no maritime lien arises thereon. *The General Smith*, 4 Wheat. 438; *The Lottawanna*, 20 Wall. 219; *Same case*, 21 ib. 571, 580; *Steamer St. Lawrence*, 1 Black, 522; Admiralty "Rule XII.," 21 Wall. 560.

Since, then, the case can not be summarily disposed of on the ground that the contract on which the suit was founded is not a maritime contract, how is it affected by the maritime character of the contract? There would be no difficulty in disposing of this question, if a maritime lien resulted from the contract; for, then, it is conceded to be the settled law, that the proceeding *in rem* would be within the *exclusive* cognizance of the admiralty powers of the federal courts. *The Moses Taylor*, 4 Wall. 411; *The Hine*, ib. 555; *The General Buell*, *supra*. Does the fact that no maritime lien arose on the contract lead to a different result? The answer

Steamer Petrel v. Dumont.

to this question requires a more extended examination of the admiralty jurisdiction and powers conferred upon the Federal courts.

The Constitution of the United States extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

The 9th section of the judiciary act of 1789, in establishing the jurisdiction of the Federal courts, provides that the District Courts of the United States "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." The language of the act is broad and general, comprehending *all* causes of admiralty and maritime jurisdiction. Every case of that character comes, therefore, within the original cognizance of the District Court of the United States, and that cognizance is *exclusive* of that of any other court, excepting only the right of common-law remedies, which are expressly saved to suitors. If, then, the claim on which the suit is founded be one of admiralty and maritime jurisdiction, and the remedy resorted to is one unknown to the common law, it logically follows that the case comes within the exclusive cognizance of the Federal court, and that the State court has not, therefore, jurisdiction of such remedy.

It must, then, be determined whether the case is one of admiralty jurisdiction. That the contract for repairs of the boat at her home port, on which the suit was brought, is a maritime contract, on which a suit *in personam* might have been brought in the Admiralty Court, is settled by the decisions of the Supreme Court of the United States.

It is equally well settled that, in the execution of the admiralty powers of the United States District Courts, process *in rem* may be issued by them upon contracts for repairs or supplies to domestic vessels, where there exists a local or State lien therefor, though no maritime lien arises on such contracts. Admiralty "Rule XII," of 1844 and of 1859, 21 Wall. 560; also, Admiralty Rule of 1872, *id.* 562; *The Steamer St. Lawrence*, 1 Black, 522.

The fact that process *in rem* was prohibited by "Admiralty Rule XII." as it existed from 1859 to 1872, during which period this case was brought, does not at all affect the question of jurisdiction conferred by the act of 1789; for the process, under the

Steamer Petrel v. Dumont.

admiralty jurisdiction, whether it be *in personam* or *in rem*, pertains to the form of remedy only, and is not a test of jurisdiction. The admiralty jurisdiction of a case rests upon other grounds than that of the form of the remedy pursued. In all cases on contracts coming within that jurisdiction, the remedy may be sought *in personam*, and when the case is one in which there exists a maritime lien, the remedy may, of right, be pursued *in rem*; and if there be no maritime line, but one exists, arising from the cause of action against the vessel or boat by virtue of a State law, courts of admiralty may extend their process *in rem* to the enforcement of the lien, subject to the rules of practice adopted by the United States Supreme Court. But the use of this process relates wholly to the remedy, and not to the jurisdiction of the case. It was accordingly held, in the *Steamer St. Lawrence*, *supra*, that, though such local or State liens form no part of the admiralty and maritime jurisdiction conferred on the government of the United States, they might nevertheless be enforced by the admiralty courts, when the contract to which they appertained was within the admiralty jurisdiction, not as a matter of right, but as a discretionary power, which the court might exercise for the purposes of justice. The question of jurisdiction, then, is not dependent on the form of the process.

“The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation.” *People's Ferry Co. v. Beers*, 20 How. 393. That the clause of the act, “all civil causes of admiralty and maritime jurisdiction,” relates to the nature and subject-matter of such “causes,” is evinced by the saving clause, preserving to suitors common-law remedies on the same causes of action. We must then look to the subject-matter or nature of the contract to determine whether the cause is one of admiralty and maritime jurisdiction within the meaning of the act of 1789. This is the fundamental inquiry in all the cases where the question has been raised. *The Moses Taylor*, 4 Wall. 427; *The Belfast*, 7 id. 637; *Steamboat Orleans v. Phœbus*, 11 Peters, 175; *Brookman v. Hamill*, 43 N. Y. 554; S. C., 3 Am. Rep. 731; *Steamboat Josephine*, 39 N. Y. 19; *Crawford v. Bark Caroline Reed*, 42 Cal. 469.

There can be no maritime lien, when the case relates to a con-

Steamer Petrel v. Dumont.

tract, without a maritime contract out of which it arises, and no process *in rem* is of right without a maritime lien ; nor does the State law give a lien and process *in rem* against a boat otherwise than "for all debts contracted on account thereof" (S. & C. 252) ; so that at last the process and lien depends upon the contract, and without the contract there would be neither process, lien, nor cause of action, it is therefore, the contract upon which the action is founded that determines the question of jurisdiction, and if that be maritime, it falls within the admiralty and maritime jurisdiction, conferred on the United States District Courts.

We have already shown that the claim on which the suit was based is one of a maritime nature ; and, therefore, it is a "cause of admiralty and maritime jurisdiction" within the meaning of the ninth section of the act of 1789. That jurisdiction is *exclusive*, and its exclusive character is not confined to maritime liens, but expressly extends to all civil causes of admiralty and maritime jurisdiction ; when, therefore, the jurisdiction exists, it is exclusive in all cases, subject only to the saving clause of the section. It remains, then, to determine whether the case comes within that clause. It is in this view only that it becomes material to consider what effect the character of the proceeding has upon the case.

The saving of the section is not that of a concurrent remedy in other courts, leaving nothing to the exclusive cognizance of the admiralty court, nor of a State remedy where no maritime lien exists, but the saving is to suitors alone, and to them of common-law remedies only. If, then, a proceeding *in rem* against a boat or vessel, after the manner of courts exercising admiralty jurisdiction, is not a common-law remedy, the saving clause in question does not exempt the case from the exclusive cognizance provided for in the act. By an act of Congress, the forms and modes of proceeding of courts of admiralty jurisdiction are required to be according to the course of the civil law. *The Steamer St. Lawrence*, 1 Black, 527. The admiralty proceeding *in rem* had its origin in the civil, and not in the common law.

In the *Moses Taylor* and *Hine* cases, the Supreme Court of the United States expressly decided that such a proceeding *in rem* is not a common-law remedy within the meaning of the saving clause in question, and these decisions were followed by the Supreme Court of this State in *The General Buell v. Long*. It is true that in each of these cases the action was founded on a claim where, by

Steamer Petrel v. Dumont.

virtue of a maritime lien, the admiralty remedy *in rem* existed as matter of right. But the existence or non-existence of the right to that remedy in admiralty cannot affect the question as to whether it ever was a common-law remedy. Nor is the holding in either case made to depend at all upon the existence of an admiralty lien, but in all of them it is based solely on the maritime character of the contract. The language of the court in *The General Buell*, as authoritatively expressed in the syllabus, is as follows :

“ A proceeding against a steamboat or other watercraft as defendant under the watercraft law of this State of February 26, 1840, for the breach of a maritime contract, is not a common-law remedy, within the meaning of the saving clause of section 9 of the judiciary act of 1789 ; but such a proceeding is in the nature, and has the effect of a proceeding *in rem* in admiralty.”

And such has been the ruling in numerous cases where, as in the one before us, no lien but that created by the State existed. *The Steamboat Josephine* ; *Brookman v. Hamill* ; *Crawford v. Bark Carolina Reed*, *supra* ; *Dever v. Steamboat Hope*, 42 Miss. 715 ; S. C., 2 Am. Rep. 643. It may, then, be regarded as settled law that the proceeding *in rem* against a boat or vessel by name, after the manner of admiralty courts, is not a common-law remedy, and therefore not within the saving clause of section 9 of the act of 1789.

It is said that the suit was not brought on a contract, but is merely a proceeding to enforce a State lien, where no maritime lien exists, and so does not encroach upon the admiralty jurisdiction. But the fact of encroachment is not what decides the question of jurisdiction. Proceeding by common-law remedies, but for the saving clause of the section, would be an encroachment of the admiralty jurisdiction.

In all the cases the jurisdiction is made to depend upon the contract out of which the lien arose. Any case *in rem* may, in some sense, be said to be a mere proceeding to enforce a lien. A State cannot create a maritime lien, nor are the proceedings *in rem*, in any of the cases in the State courts, to enforce a maritime lien as such, but are brought to enforce the State lien only. The *Moses Taylor* and *General Buell* cases were each brought to enforce State liens, and not maritime liens ; and the same argument might have been urged in those cases to sustain the jurisdiction of the State court ; but the State jurisdiction was not sustained in those cases, not

Steamer Petrel v. Dumont.

upon the ground of an encroachment of liens, but because the contracts on which the liens were founded were maritime, and, therefore, within the admiralty jurisdiction. In the *Buell* case it is said in the opinion that the case was instituted against the boat "for the breach of a contract to transport the plaintiff;" so the action, as well as the lien, is founded on the contract.

In *Hamilton v. Merrill*, 25 Ohio St. 11, the court say: The question of jurisdiction, under the watercraft act, "depends on the fact whether or not the cause of action in the case was a maritime cause of action." So in *The Scow Tuttle*, 23 id. 565; S. O., 13 Am. Rep. 271, "the contract out of which the cause of action arose" is made the test of jurisdiction; so that when, as in this case, the State lien is founded on a maritime contract, the jurisdiction of the contract determines the fate of the lien; for without the contract there would be no lien; they cannot be separated.

But an examination of the State watercraft law (S. & C. 252, and S. & S. 92), under which the suit was brought, will show that the action, as well as the lien, is based on the contract, and that the suit against the boat is as much founded upon the contract as it would have been had it been brought against the owner alone. By the first section of the act, the lien against and liability of the boat "for debts contracted on account thereof," for repairs and supplies, is provided for; and the second section authorizes any person having such claim to proceed "against the craft itself." The third section provides that "when the suit shall be commenced against the craft, the plaintiff shall file his petition * * * against the craft by name, * * * which petition shall contain, as in other civil actions, a statement of the facts constituting the plaintiff's cause of action, and a demand for the relief which the plaintiff supposes himself entitled to." The fourth section provides that a summons shall issue, with the warrant of seizure, "as in other civil actions;" and the sixth section provides that the case shall proceed to judgment and execution to the full satisfaction of the judgment, "as upon other judgments." Accordingly, the case made in the pleadings against the boat in this case is, as required by the statute, the same as it would be if the suit was against the owner. The contract is, of necessity, the foundation of both the lien and the action, and the suit is brought to recover a judgment on the contract against the boat, as defendant, in place of the owner. The cause of action is the contract for repairs; the pro-

Steamer Petrel v. Dumont.

ceeding against the boat is a remedy given by statute on the contract. Since, then, the enforcement of the lien cannot be detached from an enforcement of the contract, and the contract, which is the basis of both the lien and the action, is of a maritime nature, and, therefore, within the admiralty jurisdiction, the case comes within the cognizance of the admiralty courts, which is exclusive of that of all other courts, except as to common-law remedies.

We have been referred to decisions of the highest courts in a number of the States, holding that the proceeding *in rem* on contracts for repairs or supplies to a vessel at her home port is not within the exclusive jurisdiction of the admiralty courts. But the ground of the decisions, in all the cases which give any reasons therefor, is that the contract is not a maritime contract. That ground, under the decisions of the United States Supreme Court, we have seen, is not tenable.

The following cases, directly on the question involved in this case, recognizing the maritime nature of such contracts, are in accordance with the views we have expressed, and have influenced our determination of the case. *Brookman v. Hamill*, 43 N. Y. 554; S. C., 3 Am. Rep. 731; *Steamboat Josephine*, 39 N. Y. 19; *Crawford v. Bark Caroline Reed*, 42 Cal. 469; *Dever v. Steamboat Hope*, 42 Miss. 715; S. C., 2 Am. Rep. 643; *Weston v. Morse*, 40 Wis. 455.

Although the exact point in controversy in this case has not, perhaps, been necessarily involved in any case decided by the United States Supreme Court, it is believed the principles involved in the cases determined by that court are decisive of the case. Various *dicta* of some of the justices of that court have been referred to in support of the proposition that when courts of admiralty refuse the process *in rem*, resort may be had to the State laws giving that form of remedy. But these *dicta* are referable to a want of admiralty jurisdiction of the contract, or to the enforcement of State liens in the State courts by proceedings other than the process *in rem*.

In *The Belfast*, 7 Wall. 624, it is said: "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit of proceeding *in rem*, as practiced in the admiralty courts. * * * Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port; and, in respect to such

contracts, it is competent for the States under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement."

"Contracts for ship-building are held not to be maritime contracts, and, of course, they fall within the same category."

The same justice has many times since repeated the same remarks, without, however, ever having explained how contracts for ship-building, not coming within the admiralty jurisdiction, fall into the same category with maritime contracts in which no maritime lien arises, nor what would be regarded as reasonable rules and regulations for the enforcement of such maritime contracts.

In the latter case of *Edwards v. Elliot*, 21 Wall. 532, we are left to infer that a proceeding *in rem* on such contracts in a State court would be in conflict with the exclusive cognizance of the admiralty courts; for the same justice there says, in regard to such contracts and State liens, that the State may "enact reasonable rules and regulations prescribing the mode of their enforcement, *if not inconsistent with the exclusive jurisdiction of the admiralty courts.*" The words here added to the former statement of the power of the State courts are significant, in connection with the fact that the case was decided about the time that of *The Lottawanna*, 21 Wall. 558, which was twice argued and much considered, was announced. In that case the opinion was delivered by another justice, who is more explicit. His language is as follows:

"It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the right of material-men furnishing necessities to a vessel in her home port may be regulated in each State by State legislation. State laws, it is true, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the State courts so as to enable them to proceed *in rem* for the enforcement of liens created by such State laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States, having

Steamer Petrel v. Dumont.

jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by State laws."

This enunciation from the Supreme Court of the United States is directly in point, and is in harmony with its former decisions. We may, therefore, reasonably conclude that it was put forth as the holding of the court upon a point which, though not essential to the decision of the case, had been considered by them, for it is evident that the point has often been called to their attention.

We are strengthened in this belief from the fact that the rule restoring the process *in rem* against domestic ships to the admiralty courts, was adopted by the Supreme Court about the time of the later decisions referred to, doubtless to preserve the remedy *in rem*, which would otherwise be wholly unavailable in that class of cases.

It follows that the remedy *in rem* against a boat or vessel, given by the State watercraft law, so far as it relates to contracts of a maritime nature, is unavailable in the State courts, by reason of its being within the exclusive cognizance of courts of admiralty jurisdiction, and that such State liens, so far as relates to the State courts, are left to be enforced therein by other remedies, which are or may be provided by law.

Judgment reversed.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

STEWART V. HARRIMAN.

(38 N. H. 25.)

Will — witness to — executor may be.

The executor named in a will is a competent attesting witness thereto, where he has no beneficial interest therein other than the commission on the estate allowed by law for his services.

A PPEAL from a decree of the judge of probate of Merrimack county, proving and approving a certain paper as the last will and testament of Francis Davis, deceased. Among other things, it was alleged by the contestant, that the said will was not duly executed, for the reason that one of the three attesting witnesses of said instrument was Mary A. Harriman, who was, at the date of the execution thereof, and now is, the wife of said Henry H. Harriman, who wrote said instrument, and who is named therein as executor, and who has accepted said office and trusts, and has been duly appointed and qualified in respect thereto, and was, at the date of such probate in solemn form, and is, acting in such capacities.

Hawthorne & Greene, Mugridge and Tappan, for appellant.

Eastman, Page & Albin and Sargent & Chase, for appellee.

Stewart v. Harriman.

LADD, J. I agree with the chief justice, that the right of Judith H. Stewart to have the will proved in solemn form was not lost by the lapse of time, and do not wish to add any thing to the reasons he has given for that conclusion.

The second question in the case is, was Mary A. Harriman, wife of the executor, Henry H. Harriman, a "credible witness" within the meaning of the statute, at the time of the execution of the will? It is conceded that this depends upon whether her husband was disqualified to be a subscribing witness, by the fact that he was therein named as executor. This question has, therefore, been most elaborately discussed by counsel, who have called our attention to a great number of cases, both English and American, bearing more or less directly upon it. As to the English authorities, they seem to be uniform, that an executor, who takes no beneficial interest under the will, is a good attesting witness. *Phipps v. Pitcher*, 6 Taunt. 220; *Bettison v. Bromley*, 12 East, 250; *Goodtitle v. Welford*, 1 Doug. 139; and see *Lowe v. Jolliffe*, 1 Wm. Bl. 365. It is said, however, by counsel for the appellant, that these cases may stand well enough, because in England the office of executor is simply a burdensome trust, for the performance of which no compensation is allowed; but that where, as in this State, a commission on moneys coming to the hands of the executor by way of remuneration for his services, and for the care, trouble, and risk not otherwise compensated (*Gordon v. West*, 8 N. H. 444), he takes such a direct interest under the will as disqualifies him to be a subscribing witness.

The question is, was the witness incompetent by reason of interest at the time of attesting the will? Gen. Stats., ch. 175, § 12; and see 1 Redf. on Wills 253, n. 1. It seems to me this question is determined in the negative by the plainest application of the rule with respect to disqualifying interest, as laid down in all the books and cases. That rule, as given by Professor Greenleaf, is, it must be, a present certain and vested interest, and not an interest uncertain, remote or contingent. 1 Greenl. Ev., § 390. That this has always been recognized in this State as a correct statement of the rule is abundantly shown by the numerous cases in our reports, where it was discussed and applied before the statutes removing the disqualification of interest. Mor. Dig., tit. Interest, p. 641, *et seq.*

Which one of the requirements of this rule is met by the fact, that, if the testator does not revoke his will, nor make another

nor nominate another executor, and the executor lives, and accepts the trust, and is duly appointed to administer by the Probate Court, and actually enters upon the administration, he will be entitled to commissions ?

Was the interest a present interest at the time of the attestation? The answer to this is found in the fact, that the will does not take effect till the death of the testator. Was it certain? The answer to this is found in the fact, that if the executor died before the testator, there is nothing which he has taken by the will that will go to his heir or administrator, or that he can himself dispose of by will. It is inconceivable to me upon what ground, or in what proper sense of the term, an interest can be called vested, which may be recalled and obliterated by him who has created it at any moment after its creation, and before the possibility of its possession and enjoyment has ever arisen. A thing like this, so evanescent and uncertain as almost to elude the keenest legal optics, seems hardly entitled to be called an interest at all, much less a vested interest. The word "vest" is defined, "to give an immediate fixed right of present or future enjoyment." Bouv. L. Dic. A vested interest can mean nothing else than an interest in respect of which there is a fixed right of present or future enjoyment. The power of a testator over his will to destroy it, make a new one, or appoint another executor, certainly seems to leave narrow ground for the contention that the interest of the executor therein named is a vested interest.

In *Smith v. Blackham*, 1 Salk. 283, TERBY, C. J., held that "an heir apparent may be a witness concerning the title of the land, but a remainderman cannot, for he hath a present estate in the land; but the heirship of the heir is a mere contingency." This seems to be going about as far as to hold that an executor, to whom a beneficial interest is given by the will, may be an attesting witness. There is no fixed present right in either case, and the contingency as to future enjoyment is to all appearance as great in the case of a legatee or devisee before the death of the testator, as in case of an heir apparent before the death of the ancestor. But I have not seen the doctrine anywhere questioned, and Mr. Greenleaf quotes it as good law. 1 Gr. Ev., § 390. This case was in 1699. Nearly a hundred years later, in the case of *Bent v. Baker*, 3 Term 27, Lord KENYON has some observations on the subject, which I quote. He says: "I premise, with mentioning what was said by Lord MANSFIELD (*Walton v. Shelley*, 1 Term, 300,) on this subject,

Stewart v. Harriman.

that 'the old cases, upon the competency of witnesses, have gone upon very subtle grounds. But of late years the courts have endeavored, as far as possible consistent with those authorities, to let the objection go to the *credit* rather than to the *competency* of a witness;' and if the opinion of so great a judge stood in need of any support, it would have it from the sentiments of Lord HARDWICKE, in the case of *King v. Bray* (Cas. Temp., Hard., 360), who said, that "whenever a question of this sort arose on which a doubt might be raised, he was always inclined to restrain to the credit rather than to the competency of the witness, making such observations to the jury as the nature of the case should require. Now, fortified with two such authorities as these, I have no scruples in declaring my concurrence that, wherever there are not any positive rules of law against it, it is better to receive the evidence of the witness, making, nevertheless, such observations on the credit of the party as his situation requires." But in the case which we are considering, after the lapse of almost another century, when the policy of the law has become fixed and unmistakable in the direction of admitting rather than excluding light, I think it is quite unnecessary to invoke even the sensible doctrine thus emphatically announced by HARDWICKE, MANSFIELD, and KENYON; for in none of the oldest cases have I found a witness excluded for interest upon a ground sufficiently subtle to warrant us in holding this witness incompetent.

Richardson v. Richardson, 35 Vt. 238, is exactly in point, and I do not see how a different position can be held without overturning such cases as *Sears v. Dillingham*, 12 Mass. 358; *Comstock v. Hadlyme*, 8 Conn. 254, and a multitude of others, decided by American courts which Judge Redfield (1 Redf. on Wills 258, n. 12) cites in support of his own statement, that "the proposition of the competency of an executor to be one of the witnesses of the will seems to be well settled in the American States."

I have thus far placed my opinion upon the sole ground that the right of the executor, named in the will, to administer the testator's estate, and so to receive commissions, was not a present certain, and vested interest, such as to render him, or, what amounts to the same thing, his wife, incompetent. But even admitting that this is not so,—that his right was then certain and fixed,—the appellant has still a further objection, to overcome which seems to me extremely formidable, to say the least. Did that right constitute an in-

terest of such character as to disqualify ? Upon this point, POLAND, C. J., in *Richardson v. Richardson*, *supra*, says: "But if it be regarded as settled at the time that he is to be executor, the only interest he can be said to acquire is to perform a service, for which he is to receive a bare compensation just in proportion to the service performed. This can hardly be regarded as a legal interest, by any rule that has ever been recognized in the law. If a fixed per cent were given by law, irrespective of the actual services performed, it would be quite a different case." To my mind that is conclusive. But whether it be so regarded or not, it is certainly sufficient to raise a very grave doubt, and such a doubt as makes it the duty of the court to apply the doctrine of the great English judges already quoted, and admit the witness, weighing the fact of inclination or bias which may be thus created in her mind, for whatever it may be worth, against her credit.

SMITH, J. It would be little less than absurd to hold that a petition for the re-examination of the probate of a will must not only be filed, but that a hearing or trial thereon should be had, and a decree or judgment rendered, all within the space of one year from the probate of the will. Such a result could not ordinarily be reached by the use of even the utmost diligence. If the legislature intended such a construction should be put upon the statute — Gen. Stats., ch. 175, § 7 — they have failed to say so, and too serious consequences are involved to warrant us in holding that such intent is to be inferred from the language used.

The other question raised is, whether the wife of a person named as executor is a credible attesting witness to the execution of a will. This question, so far as I am aware, is presented here for the first time. I have examined, so far as I have had opportunity, the decisions of other States, and, with the exceptions of the courts in North and South Carolina, the authorities are uniform that the executor, not otherwise interested in a will, is a competent attesting witness.

In *Bettison v. Bromley*, 12 East, 250, the wife of an executor, taking no beneficial interest under the will, was held to be a competent attesting witness to prove the execution of it, within the description of a credible witness in the statute of frauds (29 Car. 2, ch. 3, § 5). Lord ELLENBOROUGH, C. J., said: "The point had been decided so long ago as Lord HALE's time, that an executor having no interest in the surplus was a good witness to prove the

Stewart v. Harriman.

will in a cause concerning the estate, and this had been followed by other decisions to the same effect." So, in *Phipps v. Pitcher*, 6 Taunt. 220, an executor, clothed with a trust to pay debts, and to lay out money for the benefit of the testator's children, and with power to sell lands, but taking no beneficial interest in the will, was held to be a good attesting witness to the will.

Of the American cases, in *Snyder v. Bull*, 17 Penn. St. 58, is an able opinion by GIBSON, C. J., where the executor was held to be a competent subscribing witness. He said: "Granting for the moment that the office of an executor is a beneficial one, he was not an executor, though nominated, for no man living has an executor, but he might eventually be one. True, but he might not. He might die in the life-time of the testator, or his nomination might be revoked, or he might not find it convenient to accept. He may have had the executorship in prospect; but a contingent interest does not disqualify a witness at the time of deposing, or for an equal reason at the time of attesting. Had he renounced, he might have been sworn; yet his renunciation would not have been a release of an immediate interest. But, in contemplation of law, an executorship is not an office of profit. In England, the services are gratuitous, and, though they are paid for here, the design of the allowance is compensation. It is sometimes more, and seldom less; but the executor is supposed to get nothing that he has not earned, and if he sometimes gets too much, it is the fault of the court and not of the law. * * * Now, on no rule of evidence can the expectation of a fat job go to more than credibility; and interest which goes to competency is fixed and certain."

This point is decided the same way in Maine, in *Jones v. Larabee*, 47 Me. 474; *Patten v. Tallman*, 27 id. 17; *Warren v. Baxter*, 48 id. 193; also, in Massachusetts, in *Sears v. Dillingham*, 12 Mass. 358; *Wyman v. Symmes*, 10 Allen, 153; also, in Connecticut, in *Comstock v. Hadlyme*, 8 Conn. 254; also, in New York, in *McDonough v. Loughlin*, 20 Barb. 238. To the same effect are *Denn v. Allen*, 1 Penning (N. J.), 35; *Coalter v. Bryan*, 1 Gratt. (Va.) 18; *Peralta v. Castro*, 6 Cal. 354; *Orndorff v. Hummer*, 12 B. Monr (Ky.) 619; and *Meyer v. Frogg*, 7 Fla. 292.

In *Richardson v. Richardson*, it was said the only interest the executor can be said to acquire is, to perform a service for which he is to receive a bare compensation, just in proportion to the service performed.

In *Meyer v. Frogg*, Chief Justice BELTZELL says a contra construction "would disqualify not only the executor but all others rendering services to the estate. The judge of probate himself is allowed a compensation for his services in taking probate of the will; why is he not incompetent? In like manner the sheriff, appraisers of the estate, the auctioneer, mechanic, merchant, and lawyers rendering service, are entitled to compensation; why are they not also disqualified and incompetent witnesses?"

In *McDonough v. Loughlin*, *supra*, one Cassidy, a subscribing witness, was named as executor and residuary legatee in trust. S. B. STRONG, J., said: "It is undoubtedly beneficial to have an employment for a reasonable compensation, but the benefit is not of a character to disqualify a witness; and it is to such only that the statute refers. * * * I am inclined to follow the English decisions, as it seems to me they are supported by the better reason. It is true, that in England the executor has not generally any compensation for his services; but it is taking a very narrow view of the subject to suppose that the statute allowing a meager compensation for what are too often unthankful services, can confer such a benefit as to disqualify an otherwise competent witness. The tendency of modern legislation is to relax the rules of exclusion, and I yield to the spirit of the age where those rules were merely technical or had no substantial foundation." This decision clearly overrules *Burritt v. Silliman*, 16 Barb. 198, where the conclusion was reached by the court, as stated by HARRIS, J., "with some hesitation."

In seeming conflict with the foregoing decisions is *Tucker v. Tucker*, 5 Ired. (N. C.) 82, where the executor was held to be an interested witness, "because the act of 1799 gave an executor a legal right *over and above* his charges and disbursements to commissions on the personal estate."

In *Huie v. McConnell*, 2 Jones' Law (N. C.), 455, the court remark: "It is well settled that an attesting witness to a will must be competent at the time of attestation, and that no subsequent release, where the objection is one of interest, can restore competency. The leading case in this State is *Allison v. Allison*, 4 Hawks, 141. This was followed by the case of *Tucker v. Tucker*, 5 Ired. 161, in which the case of Allison is cited and approved, and in *Morton v. Ingram*, 11 id. 368. Both those cases are referred to as correctly decided, that the right to commissions which an

Stewart v. Harriman.

executor under our statute has is such an interest as disqualifies a witness, and that a release does not remove the disqualification.

In the case of *Huie v. McConnell*, the wife of the person named as executor was one of the subscribing witnesses; and the case would be directly in point here, if it is authority in this State.

The decision in these North Carolina cases turned upon the peculiar provisions of their statutes, which gave the executor commissions *over and above* his charges and disbursements. In *Allison v. Allison* the court say that *the right to commissions* is such an interest as disqualifies a witness, and that the executor *has a right by law* to commissions. These decisions are thus clearly distinguishable from the authorities of other States above cited, where commissions are allowed, not by virtue of some peremptory statute as perquisites, but, as in this State, as compensation for services. *Gordon v. West*, 8 N. H. 444; *Lucy v. Lucy*, 55 id. 9.

In *Taylor v. Taylor*, 1 Rich. (S. C.) 531, an executor was held to be an incompetent attesting witness to a will of personal property, under the act of 1824; but the decision was by a divided court, and several of the judges delivered very able dissenting opinions.

It appears, then, that the decisions in this country uniformly support the doctrine that the executor, not otherwise interested in the will, is a competent attesting witness, except the cases above cited from the Carolinas, which would seem to stand upon exceptional grounds. In the face of authorities so numerous, and concurred in by courts eminent for the ability of their judges, I should hesitate to dissent, even though there might be doubt as to the soundness of the principle upon which their decisions rest; but I think it has been clearly shown that there is no well grounded objection to the competency of an executor as an attesting witness to a will on the score of interest in the compensation to which he is entitled for services rendered, and the principle ought not at this day to be questioned. The policy of legislation of late years has been to relax the strictness of the rules excluding testimony on the ground of interest, and to admit such witnesses as may be available, leaving the question of credibility to be weighed with the evidence. Disabilities have been removed from parties in civil suits, from prisoners in criminal prosecutions, and from persons convicted of crime, until scarcely an obstacle remains in the way of preventing any and every one, who can throw any light upon the issue, from testifying as to all facts within his knowledge.

First National Bank v. Peterborough.

To hold, therefore, that Mrs. Harriman is not a competent attesting witness to this will would, in my judgment, be taking a retrograde step in the interpretation of principles that should govern the admission of evidence in this class of cases especially, and in the trial of causes generally. We are not called upon to take any narrow views of the subject, but are rather required to so interpret the law that the intention of testators will be carried into effect, and not be defeated.

Case discharged.

CUSHING, C. J., did not agree with the foregoing opinions although he said "I acknowledge that the preponderance of authority out of the State is that way."

FIRST NATIONAL BANK v. PETERBOROUGH.

(56 N. H. 36.)

National Banks — taxation of surplus capital.

The surplus capital of national banks, in excess of the amount they are required by law to keep on hand, is taxable by the States in which the banks are located. (*See note, p. 480.*)

PETITION by the First National Bank for the abatement of a tax. The following facts were agreed upon:

In April, 1873, the selectmen of Peterborough, legally chosen and qualified, assessed, among other taxes for that year, a tax against said bank upon ten thousand dollars of its surplus, amounting to one hundred and seventy-five dollars; that at the time of the assessment of the tax the undivided profits of the bank were more than ten thousand dollars in addition to and in excess of nine thousand six hundred and fifty-four dollars and thirteen cents, the ten per cent of net profits required by the national currency act of the United States to be kept on hand by the bank as a surplus fund; that before the assessment of the tax by the selectmen they called upon the proper officers of the bank to exhibit to them an account of the surplus capital of the bank, which exhibit the bank, by their

First National Bank v. Peterborough.

officers, refused to make, claiming that the same was not taxable property. The selectmen thereupon set down the surplus capital of the bank at ten thousand dollars, and assessed the same at the same rate as other property in town. The selectmen placed said tax with others in the hands of John H. Steele, collector of taxes in said town, for collection. Steele gave the bank notice in writing, dated November 6, 1873, requesting them to pay the tax. The bank, on February 21, 1874, presented their petition to the selectmen recited in this bill; this petition was signed by five of the directors of the bank; and the selectmen refused to abate the tax in accordance with the prayer of the petition. The questions arising on the foregoing agreed statement of facts were transferred to this court by RAND, J.

E. M. Smith and Morrison & Hiland, for plaintiffs.

A. S. Scott, for defendants.

SMITH, J. By General Statutes, chapter 49, section 5, the surplus capital on hand of banking institutions is made liable to taxation, and, by chapter 50, section 4, it is made subject to taxation in the towns wherein such banking institutions are located. By chapter 15, section 1, Laws of 1868, all shares of the capital stock of banks, located in this State, whether private, State or national, are subject to be taxed at their *par value* to the owners thereof in the town in which they reside, if in this State; otherwise in the town where the bank is located. Under the statutes of this State, therefore, there is no question that the plaintiffs were properly taxed. The statute is explicit, that the surplus capital shall be taxed, — and it is admitted that the plaintiffs had a surplus in excess of the amount of net profits they were required by the act of Congress to keep on hand, — if more than \$10,000. The question, then, remains, whether the above cited statutes of this State are in conflict with the statutes of the United States.

The act of Congress establishing national banks, approved June 3, 1864 — 13 Stats. at Large, 111 — enacts :

“§ 33. That the directors of any association may, semi-annually, each year, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth of its

First National Bank v. Peterborough.

net profits of the preceding half year to its surplus fund, until the same shall amount to twenty per centum of its capital stock."

"§ 40. That the president and cashier of every such association shall cause to be kept a correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, and such list shall be open to the inspection of the officers authorized to collect taxes under State authority.

"§ 41. *Provided*, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person, from being included in the valuation of the personalty of such person, in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. *Provided further*, that the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located." "Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

The supplementary act of Congress, approved February 10, 1868, defines the word "place," as used in the original act, to mean "State," and provides that "the legislature of each State may determine and direct the *manner* and *place* of taxing all the shares of national banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

Provision is thus made by Congress by which the *shares* of the stockholders in national banking associations may be taxed by authority of the States in which banks are located. No restriction is placed upon the amount of the tax that may be assessed, except that the rate shall not exceed that imposed upon similar institutions created by State authority, while the *manner* and *place* of taxing such shares is left to be determined exclusively by State legislation. Accordingly, in some States the tax is levied upon the bank itself at a certain rate per share of one hundred dollars, which has been held constitutional (*National Bank v. Commonwealth*, 3 Wall.

First National Bank v. Peterborough.

353), the bank being regarded as the vehicle or conduit through which the taxes of the several stockholders are collected. In other States the tax is assessed to the stockholder upon the *market* value of his share, by which mode the owner is taxed, indirectly, for his proportionate share of the surplus of the bank, including that part of the surplus which the bank is required to set apart whenever it declares a dividend, until the amount shall equal twenty per cent of its capital stock. The legislature of this State, however, has enacted that the owner shall be assessed only upon the *par* value of his stock, and the bank, as such, is made subject to taxation for the surplus capital. Can the legislature thus reach indirectly what it might do directly? There is nothing in the acts of Congress that forbids it. The surplus is the exclusive property of the bank. The national government has no interest in it. It shares in none of the profits of the bank, and is responsible for none of its defaults; and it is difficult to see how the taxation of this surplus can interfere in any way with the operations of the bank as an instrument of the national government to carry its delegated powers into execution. If taxed at all, as the law of this State now stands, it must be taxed as surplus. No reason is perceived why so large a sum should escape the tax which it is as able to bear, at least, as most other kinds of property. The power to tax the people and property of the several States has never been surrendered by the States to the general government. "The agencies of the Federal government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in the necessity of securing to the United States the means of exercising its legitimate powers, into an unauthorized invasion of the rights of the States." *National Bank v. Commonwealth*, 9 Wall. 853.

"These banks are subject to the laws of the States, and are governed in their daily course of business far more by the laws of the State than of the Union. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debt, are all governed by State law. It is only when a State law incapacitates them from discharging their duties to the government that it becomes unconstitutional." *Id.* 862.

First National Bank v. Peterborough.

In *Bank v. Lamb*, 50 N. Y. 95; S. C., 10 Am. Rep. 438, it is said : " In so far as their private business and contracts are concerned, the act does not assume to place them upon any different footing from natural persons selected by the government for the performance of some special public function, and at the same time carry on a private business on their own account. In so far as the right to carry on their private business is essential to enable them to perform any public function authorized by the Constitution, such right is doubtless protected from State interference or State prohibition. But no public character, or privilege of immunity from State laws in respect of their private dealings, appears to have been conferred on them."

Again, on page 104: " These banks are created on the theory that there are agents of the government for the accomplishment of certain purposes authorized by the Constitution; that, to enable them to perform their functions, it is necessary that they should have the power of transacting within the States a general banking business on their own account. It is only upon the theory that this power of transacting banking business is essential to enable them to perform their functions for the government that the granting of such a power by Congress can be sustained. The power to create a corporation as an appropriate instrument for the execution of a constitutional power does not carry with it authority to confer upon that corporation unlimited privileges or immunities from State law, but only such as are necessary to enable it to effect the legitimate national objects for which it is created."

Congress in the title to the act of 1864 expressed the leading object of the establishment of these banks to be, " to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." An important particular in which they differ from banks created by authority of this State is, that they are required to deposit with the treasurer of the United States a certain amount of United States bonds, upon which they receive bills or notes to an amount not exceeding 90 per cent of the par value of the bonds deposited, which they may circulate as currency for their own benefit. " Their principal office seems to be to act as vehicles for the issue of a currency based upon the credit of the government. But the government has no concern with their business operations. The currency they issue is protected wholly independently of the result of these."

First National Bank v. Peterborough.

Bank v. Lamb, supra, 95, 98. The accumulation of a surplus in excess of the amount required by statute is a voluntary matter on the part of the bank. It is neither forbidden nor required by the statute. Its net earnings in excess of the amount required to be set aside as a surplus fund may be divided among the stockholders. If so divided, it of course becomes the absolute property of the stockholders, but until so divided their interest in the same is only contingent, but the fund, while undivided, tends to increase the market value of their shares. The neglect to divide the net earnings to the extent allowed by law can in no way defeat or obstruct or affect the object which the government had in view in the establishment of these banks. The only effect of the neglect to divide such earnings is to increase the strength and efficiency of the bank, and thereby more certainly accomplish the object of its establishment. The surplus, to the extent above named, being then a matter wholly outside the requirements of the statute, and in no way impairing or defeating the object of establishing such agencies of the national government, but having, on the contrary, rather the opposite effect, and the surplus being the exclusive property of the bank, subject to its unrestricted control, I see no reason why the State, in the exercise of a power which it never surrendered to the national government, to wit, that of taxing the polls and estates within its limits, cannot provide for the taxation of the surplus earnings of the national banks located within its borders to the extent above named. It is only doing directly what it has undoubtedly the right to do indirectly, as has before been remarked, if it should see fit to enact that the shares of such banks should be taxed at their market instead of at their par value.

In *National Bank v. Commonwealth*, 9 Wall. 353, it was held that the doctrine which exempts the instrumentalities of the Federal government from the influence of State legislation is not founded on any express provision of the Constitution, but in the implied necessity for the use of such instruments by the Federal government; and that such doctrine is, therefore, limited by the principle that State legislation, which does not impair the usefulness or capability of such instruments to serve that government, is not within the rule of prohibition.

In *Thomson v. Pacific Railroad*, 9 Wall. 579, Mr. Chief Justice CHASE remarks as follows: "We fully recognize the soundness of the doctrine that no State has a 'right to tax the means employed

First National Bank v. Peterborough.

by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government, and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means.

"No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States, and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the national government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection." *Lane County v. Oregon*, 7 Wall. 77.

In *Railroad Company v. Peniston*, 18 Wall. 5, it is said: "It may, therefore, be considered as settled, that no constitutional implications prohibit a State tax upon the property of an agent of the government, merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, barges, stage-coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States, it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited."

First National Bank v. Peterborough.

It seems to me to be abundantly settled, both upon authority and principle, that the States, under the existing legislation by Congress, have the unquestionable right to tax the surplus earnings of national banks within their limits, to the extent attempted in the case now before us. The services which these banks render to the government are only an incident to their general business. Their operations are only accidentally, not incidentally, connected with those of the government. Their efficiency to discharge their duties is not impaired by the taxation complained of; their property only, and not their operations, is subjected to taxation; and it is eminently just and reasonable that these institutions should bear their proportion of a common burden, in order that the State may throw around these institutions, as well as all others, and around all its subjects, protection to life and property.

CUSHING, C. J. Those portions of the statutes of the United States and of this State, which are involved in this case, are sufficiently cited in the opinion of my brother SMITH, and it is, therefore, unnecessary to cite them again.

Are these provisions in the law of the United States and in the law of the State in conflict with each other; and are they so in conflict that the law of New Hampshire cannot be enforced?

It is conceded in this case that the par value of the shares is much less than their actual value. What might be the construction if there were no surplus, and the shares were below par, is not now necessary to be considered.

The legislature of New Hampshire has, for reasons satisfactory to those whom it represents, provided that a certain portion of banking capital shall be taxed to the stockholders in the towns where they live, and a certain other portion in the towns where the banks are located. It is probable that there are satisfactory reasons why this should be so. It seems reasonable that banking corporations should contribute something toward the expenses of those towns of whose institutions and governmental arrangements, police and otherwise, they have the benefit. This might be effected by taxing the shares at their par value to the owners in the towns where they reside, and the excess over the par value of each share due to the surplus capital proposed to be taxed, to the owners in the towns where the banks are located. This would be exactly within the terms of the United States statute, and would be, as it

First National Bank v. Peterborough.

seems to me, entirely unobjectionable. If, now, it were further provided that this tax on these shares should be paid by the bank, and charged to each shareholder's account, this would obviously be a very great convenience, would be entirely consistent with the law, and, I think, could not in any way be objected to. *National Bank v. Commonwealth*, 9 Wall. 353.

Now, the surplus capital proposed to be taxed is precisely the aggregate of the values above par of all the shares due to that surplus, and the dividends payable to each stockholder are precisely the profits not reserved divided by the whole number of shares. If, then, the surplus capital is taxed in one sum to the bank, and paid by the bank out of its profits, precisely the same result would be produced, excepting in a more convenient and less expensive form. All the shares would be taxed exactly as before, each share would bear the same sum, the same amount would be taken out of the fund for division, and each shareholder's dividend would be diminished by the exact amount of his tax. Identically the same result would be produced as if the statute had been more literally followed, the only difference being that in this mode the shares are taxed to all the shareholders by the name of their association.

In this nutshell lies the whole question. The result produced by this mode of taxation is demonstrably exactly the same. Can the State do, in this slightly indirect mode, what it is conceded they may do directly? It appears to me that the objection is untenable, and a very poor kind of word-catching.

It may also be remarked that, in so far as the objection founded on any supposed interference with a government agent is concerned, it cannot possibly make any difference whether any surplus capital should be taxed to each shareholder by increasing the appraisal of his stock, or to the shareholders all together by their corporate name. The statute expressly authorizes doing it in the first mode.

The Supreme Court of the United States is of course the tribunal of last resort. I know of no case which has yet been decided, involving the exact point presented by this case. As at present advised, I find no difficulty in agreeing to the results which the court has reached.

LADD, J. I am also of opinion that the statute under which this tax was assessed is not in conflict with the Constitution or any law

First National Bank v. Peterborough.

of the United States. The property upon which it was laid consists of the earnings and income of shares in a national bank, which the bank voluntarily reserved in excess of the surplus required to be kept on hand by the act of Congress. It was not capital of the bank, within the meaning of the laws of the United States, as interpreted and applied by the Supreme Court in repeated decisions since the passage of the act under which the bank was established, but simply a fund which the bank might legally have divided and paid over to the owners of its stock, in the way of dividends, but which it chose rather to retain for the purpose of enlarging and facilitating the transaction of its business. It was tangible property, situated within our territorial limits, entitled, as much as the property of any other citizen, to the full protection of our municipal laws; and it is not easy to imagine any just reason why it should not be charged with its due and equal proportion of the burden of maintaining and administering those laws.

It has not, indeed, been claimed by counsel for the bank that this surplus is not in some form a legal and proper object of State taxation. But the objection is, that the mode in which the legislature have undertaken to reach it is not warranted by the Constitution, or authorized by the act of Congress under which the bank was established; that it should have been levied by the name of a tax upon shares instead of a tax against the bank by name; that the true construction of the Constitution and act of Congress forbids a State tax of any kind, except upon real estate, to be assessed against a bank created by act of Congress, is an agent in the administration of the national finances.

It seems to me, such a construction can only be sustained by sticking very closely to somewhat narrow interpretation of the letter of the act, and disregarding altogether the spirit and purpose of both the act and the Constitution of the United States. The broad reason, upon which it was held, in *McCulloch v. Maryland*, 4 Wheat. 316, that State governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers any further than such right may be given by the act creating the agency, and so that a State, within which a branch of the bank of the United States had been established, could not, constitutionally, tax that branch, was said by Chief Justice MARSHALL to rest upon three very plain abstract propositions: (1) That a power to create implies a power to pre-

First National Bank v. Peterborough.

serve ; (2) that a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and preserve ; (3) that where this repugnancy exists, that authority which is supreme must control, not yield to, that over which it is supreme. The power of Congress to create and continue a bank having been established in a preceding part of the opinion, he remarks that it is too obvious to be denied that the power of taxing it by the States may be exercised so as to destroy it ; hence the conclusion that such power to tax does not exist in the States.

In the present case the legislature have left untouched the capital of the association, nor has there been any attempt to tax that portion of the earnings of its shares which the bank was required to set aside as a surplus for the greater security both of the government and the people. It is perfectly obvious that the levying of this tax does not touch the institution at any point where it is shielded from State taxation by the reasons upon which *McCulloch v. Maryland*, and the numerous cases following it, are placed. It is not taxing an instrument or agent of the government for property which, by the act creating it, is in any way made part of the plan of its existence, or the basis of its operations.

But it is argued that the case of *Van Allen v. The Assessors*, 3 Wall. 573, establishes the doctrine, that although this property was legally subject to taxation by the State, still, inasmuch as the legislature have directed it to be assessed against the bank instead of the stockholders individually, our statute must be held void as being repugnant to the law of Congress which allows the shares only to be taxed. I do not think the case goes that length. The main question there discussed was, whether the shares of a national bank could be taxed at all by State authority, except for what remained of their value after deducting the national securities in which part or the whole of the capital of such bank was invested ; and it was held that they might be thus taxed. It was further held, that a statute of the State of New York laying a tax upon shares in such banks, which contained no provision that such tax should not exceed the tax upon shares in State banks, could not be upheld. If there were any doubt, however, as to the doctrine of that case, it certainly seems to be quite removed by the later case of *National Bank v. Commonwealth*, 9 Wall. 353 ; and, as this case seems to me decisive of the present, it will be necessary to examine it somewhat at length.

First National Bank v. Peterborough.

It was error to the Court of Appeals of Kentucky. A statute of that State lays a tax as follows: "On bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies." And the same statute goes on to enact: "The cashier of a bank whose stock is taxed shall, on the first day of July in each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent upon the amount; and the said bank or corporation shall thereby forfeit the privileges of its charter."

Acting under this statute, the Commonwealth demanded of the plaintiffs in error — the First National Bank of Louisville — \$4,000 with interest, the sum which a tax of fifty cents per share on the shares of the bank gave.

There was judgment against the bank in the State court, and that judgment was here affirmed.

In argument, it was strenuously urged by counsel for the bank that the State had no legal or constitutional power to coerce the bank itself to pay the tax *in solido* for its stockholders; that to prevent these organizations from being made the servants and agents of the States in the collection of taxes, thus clothing the State with an authority not justified by the Constitution, Congress had particularly prescribed the *mode* of collection, as well as the extent of it.

Mr. Justice MILLER delivered the unanimous judgment of the court, in the course of which he says:

"It is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is any thing else than a tax on these shares. It has been the practice of many of the States, for a long time, to require of its corporations thus to pay the tax levied on their shareholders. It is the common if not the only mode of doing this in all the New England States; and in several of them the portion of this tax, which should properly go as the shareholders' contribution to local or municipal taxation, is thus collected by the State, of the bank, and paid over to the local municipal authorities. * * * But it is argued that the banks, being instrumentalities of the Federal government, by which some

First National Bank v. Peterborough.

of its important operations are conducted, cannot be subjected to such State legislation. * * * The most important agents of the Federal government are its officers ; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed ; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. * * *

“A very nice criticism of the proviso to the 41st section of the national bank act, which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that, while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration

First National Bank v. Peterborough.

is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident ; and, as we have already stated it, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy."

Now let us see how this reasoning applies to the case before us. By section 1, chapter 15, Laws of 1868, "all shares of the capital stock of the banks located in this State, whether private, State or national, shall be taxed at their par value to the owners thereof, in the town in which they reside, if in this State," etc. By section 4, chapter 50, General Statutes, an act which had been in force for many years in this State when the national bank act was passed, "the surplus capital on hand in banking institutions shall be taxed in the towns wherein such banking institutions are located ;" and to prevent the possibility of wrong from thus separating what might perhaps well enough be treated as a single interest, it is expressly provided that "no statute provisions shall be so construed as to subject any stock to double taxation." Gen. Stats., chap. 49, § 7.

It is not pretended that there is any double taxation here, nor is it claimed but that this surplus voluntarily reserved by the bank, beyond what it is required by the act of Congress to retain, enhances the value of the shares just as directly as though it were actually divided and added to the shares by some act of the bank. That is, the shares represent the interest of their owners in this surplus, just as much as they do the interest of the shareholders in the capital stock and property of the bank, which is made exempt from State taxation by the Federal law. To continue, so far as might be consistent with the full operation of the new system, established by the national legislature, a mode of taxation to which our people from long use had become accustomed, and thus provide that the great change made in the currency of the country by the national bank act should go into effect with as little friction as possible, our legislature did not change the law of the State in this regard, but still continued to towns in which a bank may be situated the right to tax this surplus as property located within their cor-

First National Bank v. Peterborough.

porate limits, instead of treating the surplus as an increment to the shares, which it really is, and dividing the tax upon it among the various towns where the shares are owned. Most clearly it is a tax upon value, represented by the shares. In substance, it is a tax upon the shares and nothing else. The only difference is, that by our statute it is to be paid out of funds, the beneficial ownership of which is in the shareholders, by the hand of the bank, whereas, if it were assessed upon the shareholders individually, it would be paid by them directly without the intervention of the bank. The legal title to the money may be in the corporation until it is divided and handed over to the stockholders, but this legal ownership is of no higher character than that of a trustee for the owners of the shares; and, in reality, it is only by consent of the shareholders that the surplus is not distributed to them.

In *National Bank v. Commonwealth* it was held, as we have seen, that a tax upon shares might legally be levied directly against the bank. Is it to be held that a tax, which is in fact and to all practical intents upon shares, cannot be levied against the bank, merely because the legislature call it by another name, and assess it upon a surplus always definite and easy to be ascertained? I think not. See *Thomson v. Pacific Railroad*, 9 Wall. 579; *Railroad Company v. Peniston*, 18 id. 5. My opinion, therefore, is, that the case is entirely within the doctrine of *National Bank v. Commonwealth*; and, as this is the opinion of all the members of the court, the

Petition must be dismissed.

NOTE.—The following is a decision of the Supreme Court of the United States on the subject of State taxation of National Banks, delivered at the Term commencing October, 1877:

ADAMS et al., plaintiffs in error, v. MAYOR, ETC., OF NASHVILLE.

The act of Congress of June, 1864, in relation to the taxation of National Banks does not curtail State power as to the subject of taxation, or cut off the right to exempt certain kinds of property if a legislature chooses to do so. Its only object is to prevent unfriendly discrimination against National Banks.

In error to the Supreme Court of the State of Tennessee. Sufficient facts appear in the opinion.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiffs in error, who are stockholders in the Fourth National Bank of Nashville, Tenn., filed their bill in the Chancery Court of that State against the defendant in error, a municipal corporation, to enjoin the collection of a tax imposed upon their shares of stock by said corporation, and to have the tax declared illegal and void.

The bill was demurred to. The chancellor sustained the demurrer and dismissed the bill. Upon appeal to the Supreme Court of Tennessee, the highest

First National Bank v. Peterborough.

court of law or equity in the State, the decree of the chancellor was affirmed, and thereupon the case was brought to this court by writ of error.

It is contended that the statute of the United States which authorizes the taxation by State authority of the shares of stock in a National Bank, but provides that such taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individuals, has been violated in the case of the present plaintiffs. 13 Stat. at Large, 102. The first cause of complaint arises out of the act of the legislature of the State of Tennessee of March 1, 1869. The act, it is said, provides that no tax shall be assessed upon the capital of any bank or joint-stock company organized under the laws of that State. This, it is insisted, is an exemption from taxation of property in the hands of individual citizens, and operates to produce a greater rate of taxation on the plaintiffs' shares in the Fourth National Bank of Nashville than is assessed on other moneyed capital in the hands of individuals, to wit, on such banking capital, and hence, that such taxation is illegal.

The statute enacts that no tax shall be assessed upon the capital of a State bank, but proceeds, in the same section, to say that its shares shall be included in the valuation of the personal property of the owner, for the purpose of assessment for State, county, and municipal taxation, at the same rate that is assessed upon other moneyed capital, and that, in addition thereto, the real estate owned by the bank shall be subject to the same taxation as other real estate.

This objection, in its general character, may be considered in connection with the second objection. The answer to both of them is found in the principle thus laid down in *People v. Commissioners*: "That the rate of taxation upon the shares should be the same or not greater than upon the moneyed capital of the individual citizen which is liable to taxation; that is, no greater in proportion or percentage of tax in the valuation of shares should be levied than upon other moneyed taxable capital in the hands of the citizens." 4 Wall. 250. See, also, *Hepburn v. School Directors*, 23 Wall. 480, *post*.

Second. By an ordinance of the defendants' corporation, passed on the 18th of April, 1870, it is provided that certain interest-paying bonds issued by the said corporation shall be exempt from taxation by said corporation. It is said that there are many such bonds in existence in the hands of individuals; that by such exemption the complainants' shares are taxed at a greater rate than is assessed upon such bonds, and that, therefore, the taxation complained of is in violation of the act of Congress forbidding the taxation of national shares at a greater rate than is assessed upon other moneyed capital in the hands of individuals.

There are several answers to this objection :

1st. It is not alleged in the bill that the bonds therein referred to are in fact exempted from taxation for municipal purposes. After reciting the issue and proposed exemption, the bill says that said property is "thus exempted from all municipal taxes;" that is, that, as a matter of law, it follows from the facts before stated that it is thus exempt.

This is not sufficient, especially when it is alleged in the brief opposed that the fact is otherwise.

2d. By the statutes of the State of Tennessee, passed subsequently to the issue of the bonds, all personal property, of every kind and nature, is required to be listed and assessed for taxation.

The Supreme Court of Tennessee hold, in the case before us, that this statute repeals and overrides the ordinance of exemption and brings these bonds

Hibbard v. Clark.

within the scope of general taxation. This is a decision of a State tribunal upon the construction of its own statutes, which we are bound to respect.

3d. Considering the objection on its merits and in connection with the objection first described, the case is met by *Hepburn v. School Directors*, 23 Wall. 480.

By a statute of Pennsylvania, it was enacted that "all mortgages, judgments, recognizances and money owing upon articles of agreement for the sale of real estate shall be exempt from taxation, except for State purposes." There, as here, it was objected that this exemption by relieving certain specified property from taxation brought the case within the prohibition of the act of Congress, and thus vitiated the tax sought to be enforced. This court held otherwise.

The act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so. Homesteads, to a specified value, a certain amount of household furniture (the six plates, six knives and forks, six tea-cups and saucers, of the old statutes), the property of clergymen to some extent, school-houses, academies and libraries are generally exempt from taxation. The discretionary power of the legislature of the States over all these subjects remains as it was before the act of Congress, of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from an unfriendly discrimination against them of the power of State taxation. That particular persons or particular articles are relieved from taxation is not a matter to which either class can object.

The third objection is equally untenable. The statute referred to does not purport to relieve any property from taxation. It provides a mode for ascertaining the average capital of the merchant, and for giving a license to carry on the business of a merchant. He is required to pay an *ad valorem* tax on all his capital and a license tax in addition.

The observations already made are pertinent under this head.

HIBBARD v. CLARK.

(36 N. H. 155.)

Tax — set-off by town.

A town summoned as trustee or garnishee of an individual cannot set off taxes assessed by it on him against the debt due from it to him.

FOREIGN attachment. The deposition of Lucius M. Howe was as follows:

"I, Lucius M. Howe, depose and say, that I am chairman of the board of selectmen of said town [Plymouth]; that, at the time of

Hibbard v. Clark.

the service of said writ on the town, Joseph Clark had an account against the town for personal services and costs paid out — mostly for his services — of \$414.99; that at the same time he owed the town, for cash in his hands belonging to the town, \$312.42, and there were outstanding taxes legally assessed against him by the selectmen of said Plymouth, due and unpaid, to the amount of \$82.37; also taxes legally assessed against the firm of Clark & Houston, of which said Clark was a partner, of \$45.38, due and unpaid; and that said town claims the right to offset said money and taxes against any claim or debt on account due the said Clark, to the amount of the same; and same have been credited on said Clark's account since the service of said writ or trustee against the town, and a balance found due said town from said Clark; — and said town, as I understand it, was not, at the time of the service of said writ, nor has been at any time since, indebted to said Clark, nor had any money, goods, chattels, rights, or credits of said Clark in its hands or possession, unless upon the facts aforesaid."

The question of the chargeability of the trustee on the foregoing deposition was transferred to this court by LADD, J.

Carpenter, for plaintiffs.

L. W. Fling, for Plymouth.

SMITH, J. By General Statutes, chapter 208, section 7, it is provided that where "there are mutual debts or demands between the plaintiff and the defendant, at the time of the commencement of the plaintiff's action, one debt or demand may be set off against the other."

The trustee process being an equitable proceeding, the courts of this State have uniformly held that a trustee is entitled to retain, or to set off against the debt which he may owe the principal defendant, any demand which he might set off, or of which he might avail himself by any of the modes allowed, either by the common or statute law, if the action were brought by the defendant himself, or if the proceedings were wholly between the trustee and the principal defendant. *Brown v. Warren*, 43 N. H. 430; *Swamscot Machine Co. v. Partridge*, 25 id. 374, and authorities there cited, where it is said that the rights and liabilities of trustees are not changed to their prejudice by the fact that the action is commenced by the creditor of the principal defendant and not by the principal

defendant himself. The only object and legitimate effect of the trustee process is to entitle the creditor to secure and apply to the discharge of his claim against the principal defendant such sums of money as may be found to be legally or equitably due from the trustee to the principal defendant, or such other goods or credits of the defendant as may be found in his possession beyond what may be due from the defendant to the trustee. *Id.* 373, 374.

The question for our consideration is, whether the taxes assessed by the town of Plymouth, the trustee in the suit, against Joseph Clark, the principal defendant, and against Clark & Houston, of which firm he is a member, constitute a "debt or demand" which can be set off in this proceeding against the sum which is due from the trustee to the defendant; and I am of the opinion that they do not. These words "debt and demand" are often used as synonymous. The former is the more specific, and the latter the more general term. Either would include a claim for money alleged to be due, and either is broad enough to allow a judgment recovered by the trustee against the principal defendant to be set off against the sum found due the latter from the former in the process of foreign attachment. It is not important to examine more closely, for the purposes of this case, the distinction, if any, in these terms.

The counsel for the town claims that taxes are in the nature of a judgment, so that they can be thus set off by the trustee against the principal. If this claim is correct, it would probably follow that the collector's warrant is in the nature of an execution; but I think this position cannot be maintained. Judgments are the judicial sentences of courts rendered in causes within their jurisdiction. Taxes are the proportional and reasonable assessments and duties imposed by authority of law upon the inhabitants of the State. They do not partake of the nature of judgments. The imposition and collection of them are ministerial acts, and are the proper subjects of inquiry as to the manner of their assessment and the mode of their enforcement in the judicial forum; and for their collection no right of action is given, nor can they be turned into judgments, nor are they contracts between party and party, either express or implied; but they are the positive acts of government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required. HUBBARD, J., in *Pierce v. Easton*. 8 Metc. 520.

Hibbard v. Clark.

By General Statutes, chapter 208, section 8, it is further provided that "no debt or demand shall be set off as aforesaid unless a right of action existed thereon at the commencement of the plaintiff's action." It be will noticed, that to enable a party to set off such debt or demand, it must be such that not only must a right of action exist thereon, but it must exist at the commencement of the plaintiff's action. By right of action is here meant the right to commence a suit to enforce the payment or collection of the debt or demand named in the 7th section. The right which the collector of taxes has to collect the taxes assessed in his list is in no sense a right of action ; much less is it a right of action in the town. The collection is a ministerial, and not a judicial act. It is clear that the town is not regarded in the light of a creditor of the tax payer. It cannot maintain an action to collect the same. *Crapo v. Stetson*, 8 Metc. 394, where it is said that "it is well settled that the law gives no remedy for the collection of taxes other than those provided by statute." The same doctrine is laid down in *Andover & Medford Turnpike Corporation v. Gould*, 6 Mass. 44, which was *assumpsit*, to recover assessments laid upon shares in the capital stock of the corporation, subscribed for by the defendant, where PARSONS, C. J., remarks : "It is a rule founded in sound reason, that when a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way. When we find a power in the plaintiffs to make the assessments, they can enforce the payment in the method directed by the statute, and not otherwise ; and that method is by a sale of the delinquent's shares. This rule applies to all taxes, public and private. No action can be maintained to compel the payment of State, county or town taxes, except in the particular cases in which an action is expressly given by statute."

By the statutes of this State ample and severe measures are provided for the collection of taxes. The real estate of the person assessed is holden for one year from the first day of June following assessment ; his goods and chattels, with limited exceptions, are liable to distraint ; and for want thereof his body can be taken and committed to the common jail. Gen. Stats., ch. 54. At the same time the collector is held to a rigid accountability to the town for the prompt collection and payment of his list, and is liable to a suit upon his official bond and to an extent for non-performance of his duties. *Id.*, ch. 59.

As the legislature has provided such full and ample means for the collection of taxes, and has made no provision for their collection by suit, I am clear that the trustee in this suit cannot set off the taxes assessed against the defendant and his firm against the amount which is due from them to him, and consequently they are chargeable for the sum of \$414.99 less credits \$312.42, leaving \$102.57, less also their costs.

With the ample powers with which the statute has armed the collector to enforce the collection of these taxes, and the equally ample powers with which the statute has armed the town to enforce payment from the collector, it can hardly happen that the trustee will fail to realize the amount of these assessments.

Since this case was transferred from the Circuit Court, a motion has been addressed to this court by the trustees for leave to take further depositions upon the question of their liability. If this application is to be entertained at all, it should have been addressed to the Circuit Court; but if the motion is properly here, we think that it would be encouraging a practice altogether too loose, after questions of law have been submitted to the court whether a trustee is chargeable, and after a party has taken his chances of getting a judgment in his favor, to allow him to reopen the case for the purpose of proceeding to a different result.

We do not mean to say that the court would never interfere and allow this to be done; but we are of the opinion that such a practice should not be encouraged, and we do not see any sufficient reason in the present case for departing from what we think is the proper practice.

LADD, J. Taxes are contributions imposed by government on individuals for the service of the State. Bouv. Law Dict. The mode of their collection is fully prescribed by Gen. Stats., ch. 54 and does not include the right to bring an action to enforce their payment. A set-off is in the nature of a cross-action. A tax may in some sense be said to be a demand in favor of the town or city where it has been assessed, but it is not a demand upon which an action can be brought, and I think, therefore, it is not a debt or demand within the fair meaning of Gen. Stats., ch. 208, § 7, relating to set-off. This view is strengthened by the next section of the same chapter, which provides that no debt or demand shall be set off as aforesaid, unless a right of action existed thereon at the commencement of the plaintiff's action.

Chandler v. Coe.

I am of opinion that the motion to take a further disclosure of the trustee, made in this court, should be denied, for the reasons given by my brother SMITH, and that the trustee should be charged.

CUSHING, C. J. If a tax against an individual is not a sum certain due from him to the town, and, therefore, a debt in the strictest sense of the word, and if it is not also a sum certain which the town has a right to claim, and so a demand, it is quite impossible for me to understand the meaning of the terms. If the town owes the individual a sum of money which is due to him in his own right, and the tax be his own debt, it seems to me that they must be mutual debts and demands. If, therefore, it were not for the provision in Gen. Stats., ch. 208, § 8, that "no debt or demand shall be set off as aforesaid unless a right of action existed thereon at the commencement of the plaintiffs' action," there would seem to be no doubt that the set-off ought to be allowed. If by right of action in this statute is meant a right to commence a suit at law, it is clear that the set-off cannot be allowed, and this is the opinion of a majority of the court.

Trustee chargeable.

CHANDLER V. COE.

(56 N. H. 184.)

Removal of causes — when may be had under act of 1875.

After a cause has been once tried in a State court and a verdict rendered, it cannot be removed into the United States Circuit Court, although the verdict may have been set aside for error and a new trial granted.*

PETITION for the removal of a cause into the Circuit Court of the United States, filed by the defendant, a citizen of Maine. The plaintiff was a citizen of New Hampshire. The cause was tried by a jury at the November term, 1873, and a verdict rendered for the plaintiff. That verdict was subsequently set aside for error and a new trial ordered. Thereafter, upon the petition of the defendant, the cause was ordered to be removed into the Circuit Court of the United States.

* See *Boggs v. Willard*, ante, p. 77, and note.

The plaintiff now moved that such order of removal be rescinded. This motion was granted by the court and the defendants excepted. All questions of law and discretion arising upon the foregoing statement were transferred by LADD, J.

Ray & Drew and Geo. A. Bingham, for plaintiff.

Fletcher & Heywood and Burns & Heywood, for defendants.

FOSTER, C. J., C. C. The defendant filed his petition for the removal of this cause into the United States court at the November term of our Circuit Court, 1874. His rights in respect of the removal of the cause, therefore, depend upon the provisions of the Revised Statutes of the United States, enacted June 22, 1874, and the subsequent act of Congress of March 3, 1875, and not upon the provisions of the acts of 1866 or 1867, which were repealed by the enactment of the Revised Statutes. The propriety of the rescission of the order of removal by the judge presiding at the April term, 1875, depends upon the settlement of the question whether the defendant was entitled, under the Federal statutes, to have the cause removed, after one trial upon its merits, before a second trial, which had been ordered by the full bench for error in the previous trial.

By the terms of the U. S. Rev. Stats., ch. 7, § 639, par. III, the petition for removal must be filed "before the trial or final hearing of the suit."

In *Whittier v. The Hartford Fire Insurance Company*, 55 N. H. 141; S. C., 20 Am. Rep. 185, at the last March session of this court, my brother SMITH, the other judges concurring, expressed his interpretation of the language used in the statute as meaning, not before the final trial or final hearing, but before any trial or any final hearing of the suit.

In *Insurance Co. v. Dunn*, 19 Wall. 214, in construing the act of Congress of 1866, in which the words used were the same as those adopted in the revision of 1874, "at any time before the trial or final hearing" SWAYNE, J., said: "The language above quoted 'at any time before the final hearing or trial of the suit'—of the act of March 2, 1867, is not of the same import as the language of the act of July 27, 1866, on the same general subject, 'at any time before the trial or final hearing;'" and his deduction is, that under the act of 1867 a removal might properly be made, after a trial on

Chandler v. Coe.

the merits and a judgment on the verdict, in a State where by local statute the party could still demand, as of right, a second trial, but that doubts, at least, might be entertained as to whether such would be the proper construction of the act of 1866 ; and if, as he suggests, the change was deliberately made in 1867 to obviate those doubts and to make the latter act more comprehensive, so it is equally fair to presume that the change in 1874 to the language used in the act of 1866 was deliberately made, not to revive "doubts that might possibly have arisen" under the act of 1866, but to make the latter act (of 1874) more restrictive.

Happily, no doubts can remain concerning the present intention of Congress to limit the removal of causes from the State to the Federal courts to a period antecedent to the first trial of the suit, for the act of March 3, 1875, § 3, provides that the petition for removal shall be filed in the State court "before or at the term at which said cause could be first tried, and before the trial thereof."

This act was passed some weeks before the judge made the order of rescission in the present case, and this declaration of the law and policy of the Federal Congress manifests the prudence of the judge's order, so far as the matter rested in his discretion.

In *Whittier v. Insurance Company*, the petition for removal was made after a trial and judgment unreversed by the proceedings in review ; but the distinction between that case and the present is one without substantial difference, as it seems to me, for in this case, as in that, the defendant, the verdict against him having been set aside, was as much entitled to demand a new trial, as in the former case the party was entitled to demand it under the statute granting a right of review. - In both cases there was one trial of the cause upon its merits before application for removal, and in neither case was that one trial a final trial. In *Whittier v. Insurance Co*, the petition for removal was denied.

In *Galpin v. Critchlow*, 112 Mass. 339, it was decided that an action cannot be removed from a State court into the Circuit Court of the United States under the act of Congress of 1867, after a trial on the merits, although such trial has resulted in a disagreement of the jury.

A fortiori, if the reasoning of Judge SWAYNE and my brother SMITH is correct, such cause could not in the same circumstances be removed under the act of 1866.

It will be borne in mind that the terms used in the act of 1866

are "before the trial or final hearing:" those employed in the act of 1867 are "before the final hearing or trial."

In *Galpin v. Critchlow*, Mr. Chief Justice GRAY does not contend that these terms are not equivalent. They are, in fact, whatever may have been the intention of the legislators, mere transpositions in the two several acts. And, regarding the words under consideration as practically synonymous, the learned chief justice infers that the act of 1866 (and 1867, likewise) "has regard to suits in equity as well as at law;" because it enlarges the right of removal under the act of 1789 (which was "at any time before trial"), by conferring the right in suits brought "for the purpose of restraining or enjoining" the defendant. In the act of 1866, ch. 2888, we find for the first time, if I am not mistaken, the words "or final hearing of the cause" added to the words "at any time before the trial."

"Trial," says Mr. Chief Justice GRAY, appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and 'final hearing,' in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity. The whole effect of the change in the statute in this respect seems to us to have been to allow the defendant the same time to elect whether he will remove the case into the Federal court, as he has to prepare for a trial at law, or hearing upon the merits in equity in the State court; * * * but not to allow him, after the experiment of entering upon one such trial or hearing in the court in which the suit is commenced, to transfer the case to another jurisdiction."

The learned chief justice "cannot believe that Congress, by transposing" the words, "intended that a right of removal depending upon a mere affidavit of the party to a condition of things which litigants are too often prone to suspect, and conferred by this statute upon a plaintiff who has voluntarily resorted to the State court, as well as a defendant who has been compelled to appear therein to protect his rights, should be exercised after once submitting the case to be decided in the State court upon its merits, and at a later stage than any other suit is authorized to be removed from the State to the Federal courts, except by a writ of error after judgment."

Judge REDFIELD, in a note appended to this case as reported in the Law Register (13 Am. Law Reg. 137), commends the opinion not only for the "ingenious and happy argument" presented therein, but for its "fairness and dignity," calculated, as the con-

Hardy v. Merrill.

clusion of the court is, "to maintain proper respect for the spirit of the national legislation in general, especially toward the State courts."

In holding that the ruling of the judge at *nisi prius*, rescinding the order for a removal of this cause before the intervention of a term of the Federal court at which it could have been entered, was right in point of law and sound discretion, we do no more than declare, without arrogance or assumption, that, except by writ of error from the Supreme Court of the United States, whose judgment is conclusive upon all the judicial tribunals of the land, the jurisdiction of our own State courts is not to be reduced to "very inferior and insignificant proportions."

If the views which I have expressed are sustained by my brethren, the defendant's exceptions must be overruled.

Exceptions overruled.

CUSHING, C. J., and SMITH, J., concurred.

HARDY V. MERRILL.

(56 N. H. 227.)

Will — burden of proof on probate of. Evidence — opinions of non-professional witnesses as to sanity of testator.

The party who affirms that a will was duly and lawfully executed has the burden of proof, and has, therefore, the right to open and close a trial of its validity.*

Upon the issue of a testator's sanity, non-professional witnesses, although not subscribing witnesses to the will, may testify to their opinions in regard to the testator's sanity, founded upon their knowledge and observation of his appearance and conduct.†

Boardman v. Woodman, 47 N. H. 120; *State v. Pike*, 49 id. 390; S. C., 6 Am. Rep. 533, upon the last point, overruled.

APPEAL by William Hardy from a decree of a judge of probate admitting and approving the will of Joseph Hardy, deceased. Issues having been made up at the law term, were sent to the Cir-

* See, also, *Williams v. Robinson* (42 Vt. 658). 1 Am. Rep. 359; *Peck v. Cary*, 27 N. Y. 9; *Delafield v. Parish*, 25 id. 9, 97.

† See, as to opinions of non-professional witnesses, *Commonwealth v. Sturtevant*, 19 Am. Rep. 401, and note.

cuit Court for trial. These issues were: the executor, Merrill, alleged, first, that the said Joseph Hardy was of sound mind; and second, that the will was not obtained by undue influence, upon both of which allegations issue was taken by the appellant. These issues were sent to referees for trial, who found, on both, in favor of the executor. Before the trial commenced the appellant claimed the right to open and close, which was denied by the referees. The appellant also offered the testimony of non-professional witnesses as to whether, in their opinion, the testator was of sound mind, which was excluded by the referees. The questions of law arising upon these two points were reserved to be determined by this court.

Mugridge, for appellant.

Sargent & Chase, for executor.

FOSTER, C. J., C. C. I. At the hearing before the referees the appellant claimed the right to open and close.

In *Judge of Probate v. Stone*, 44 N. H. 593, it was held that the party, on whom the burden of proof in the first instance devolved, was entitled to open and close; that to determine which party is to begin, and, of course, which shall close, is to consider which would get the verdict, if no evidence was given on either side; and the right to begin is with the one who in that way would lose his case.

In this case issues were joined by the appellant upon averments of the executor, (1) that the testator was of sound mind, and (2) that the will was not obtained by undue influence. As these issues are made up, the burden of proof would seem to be on the executor, and not on the appellant; and in *Judge of Probate v. Stone*, p. 605, it is said: "The party who affirms that a will was made has the primary burden of proof and the accompanying right to close."

In *Boardman v. Woodman*, 47 N. H. 120, 132, it is said: "Whatever form the issues which are sent to the trial term may assume in such cases, the nature of the proceeding is never lost sight of, nor is the final object to be attained to be kept from view. * * * The question to be determined, no matter in what form the issue may be drawn, is the due and legal execution of the will."

In *Perkins v. Perkins*, 39 N. H. 163, 167, BELL, C. J., says:

Hardy v. Merrill.

“ The object of the proceeding is to prove the due execution of a written instrument. * * * The instrument itself must be produced, unless in a few excepted cases where secondary evidence is admitted ; and the attesting witnesses must be produced and examined, if they are living and within reach of the process of the court. They are to be produced by the party who offers the instrument, or who seeks a decree that it has been proved. * * * The usual formal proof being offered, the law comes in with its presumption that the party is sane, and this presumption stands until evidence is offered tending to raise a different belief. * * *

“ Though ordinarily no question need be asked of the witness, who testifies to the execution of an instrument, relative to the capacity of a grantor, yet, owing to the nature of the proceedings in the case of wills, that the probate of the will is the foundation of the grant of power to the executor to take possession of the estate and the charge of administration, it is, in that case, the long-settled practice of courts of probate to require that the witnesses to wills should be examined as to the fact of the sanity of the testator before the will is established. * * * This practice is equally binding, as the law in such cases, upon the Supreme Court, as on the ordinary courts of probate. * * * It is, therefore, proper to say that the burden of proving the sanity of the testator, and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him till the close of the trial, though he need introduce no proof upon this point until something appears to the contrary.” To the same effect see *Tingley v. Cowgill*, 48 Mo. 291, and *Renn v. Samos*, 33 Tex. 760. On the other hand, it may be said, the decree of the judge of probate establishing the will was not vacated by the appeal. Gen. Stats., ch. 188, § 12.

The due execution of the will is not in controversy, and it is not necessary for the appellee to prove it. The appellant must set forth in writing the reasons of his appeal ; and in this court he is restricted to such points as are therein specified. Gen. Stats., ch. 188, § 2 ; *Patrick v. Cowles*, 45 N. H. 553 ; *Boardman v. Woodman*, 47 id. 120.

The executor has formally tendered an issue upon the sanity of his testator, and the appellant has joined that issue ; but the executor's allegation of sanity is supported, without evidence, by a presumption of law, as is said by Judge BELL in *Perkins v. Perkins*,

and he is entitled to a verdict unless the appellant assumes and discharges the burden of proof, which requires him to maintain and prove the insanity of the testator. See *Thurston v. Kennett*, 22 N. H. 151 ; *Bills v. Vose*, 27 id. 212, and cases there cited ; *Boardman v. Woodman*, 47 id. 120-144 ; *Hall v. Unger*, 2 Abb. (U. S.) 507.

In Massachusetts the statute requires the person offering a will for probate to prove the sanity of the testator (*Boardman v. Woodman*, *supra*, 125) ; but we have no such statutory provision.

In *Commonwealth v. Haskell*, 2 Brewst. (Penn.) 491, it is held that on the hearing of a commission of lunacy, the burden of proof is upon the Commonwealth, the presumption being in favor of sanity, and, therefore, that the relator has the right to open and close.

Probably the determination of this question is a matter of no practical consequence in the present case. The right, as it is called, to open and close may be a matter within the discretion of the court, the granting or refusing of which is not in general a ground for a new trial or bill of exceptions. There are many authorities which hold that a verdict will not be disturbed on the ground that the wrong party was permitted to open or to close, unless it be made to appear that injustice has been done. *Boardman v. Woodman*, *supra*, 143 ; Hilliard on New Trials, 298.

I think the court would hardly be justified in entertaining a discretion which should operate in conflict with the general rule and practice in matters of this kind.

It is not without some hesitation, nor without respect for the adverse doctrine, that I concur in the opinion of the majority of the court that the ruling of the referees, in denying to the appellant the right or privilege of opening and closing upon the trial, was correct.

II. The case before us involves an inquiry into the nature and extent of the exceptions to the general rule, that testimony of facts alone is admissible in courts of justice, and that the opinions of witnesses are to be excluded.

The same questions are presented which were considered by the late Supreme Court in *Boardman v. Woodman*, 47 N. H. 120, and *State v. Pike*, 49 id. 399 ; S. C., 6 Am. Rep. 533. In both these cases a majority of the court sustained the doctrine of the exclusion of the opinions of non-professional witnesses upon questions of mental condition.

Hardy v. Merrill.

I am unable to speak from personal knowledge (because I was not then a member of the court) of the extent and amount of consideration bestowed upon the subject in the two cases referred to. It will, however, be obvious to the reader of the reports, that in *Boardman v. Woodman* the majority of the court were content, without renewed investigation, to adhere to the rule, which they understood to be "in accordance with the long-established and uniform usage in this State;" while in *State v. Pike*, SMITH, J. (not intimating his own views), disposes of the whole question with little more than the remark: "A majority of the court are not disposed to overrule the very recent decision in *Boardman v. Woodman*, that witnesses who are not experts cannot give their opinions on the question of sanity." In *State v. Archer*, 54 N. H. 465, the court were not "prepared to overrule these decisions," nor were they prepared to investigate the matter. In view of all the other circumstances, and the established conditions of the case, this question was of slight consequence.

But the subject is so rapidly increasing in importance, that it thorough re-examination ought to be no longer postponed.

It is fair to presume that the majority of the court were satisfied, upon principle, with the reasons which had been expressed, or rather, the conclusions attained in the courts of three States of the Union, where the same doctrine had been established; and, perhaps, the most elaborate investigation might not have affected their minds in such a way as to produce a different result; nevertheless, one fact cannot be ignored, namely, that a careful examination into the history of this branch of the law, as administered in our own State, would have compelled the suppression of the remark that the rule excluding such opinions was "in accordance with the long-established and uniform usage in this State," the truth being that the usage and practice, if uniform, had been in the opposite direction, and that the rule, as declared by the Supreme Court in 1866 and 1869, is a departure from the "usage and uniform practice" in the courts of this State during a period of time when the bench was adorned by "sages of the law" whose learning and ability have commanded universal respect and admiration.

[The learned judge then reviewed the history of the usage and practice of the courts of New Hampshire, as to the admissibility of non-professional witnesses on the question of sanity, and continued.]

It would be merely a repetition of the historical part of Judge

DOE's opinion, in *State v. Pike*, 49 N. H. 421-423, if I were to relate how, after the eminent jurists, who presided in our courts between the years 1811 and 1833, had all passed off the stage, the "Massachusetts exception" gradually worked into favor in New Hampshire, it having been erroneously declared by the Massachusetts courts to be an expression of the English common law. It was a "silent, unauthentic growth," germinating in times so recent as when no judge remained upon the bench who had participated in the decision of *Hamblett v. Hamblett*, or in the trial of the early cases; and the contiguity of Massachusetts, and the resort by lawyers and judges to her reports more than to any other printed decisions, no doubt had much to do with importing into our tribunals a rule and doctrine which was, undoubtedly, well established there.

It is proper for me to invite attention to the history of what I have called the Massachusetts exception. Beginning with *Poole v. Richardson*, 3 Mass. 330 (A. D. 1807), we find no very wide departure from the general rule of admissibility. The case holds that non-professional witnesses may "not testify merely their opinion or judgment." Judge DOE (*State v. Pike*, p. 410) suspects that "the only point ruled in this case was, that the witnesses were allowed to give their opinions when they stated particular facts from which the state of the testator's mind was inferred by them."

But the exception grew and dilated, finding larger and stronger expression along through the years and the course of the cases of *Hathorn v. King*, 8 Mass. 371; *Dickinson v. Barber*, 9 id. 225; *Needham v. Ide*, 5 Pick. 510; *Com. v. Wilson*, 1 Gray, 337; down to *Com. v. Fairbanks*, 2 Allen, 511 (A. D. 1861), when it was held *per curiam*, "that the incompetency of the opinions of non-experts was not an open question in Massachusetts;" though Judge THOMAS had recently said, in *Baxter v. Abbott*, 7 Gray, 71, that "if it were a new question [he] should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation."

In very recent times, however, we observe a more liberal disposition on the part of the Massachusetts courts. See *Barker v. Comins*, 110 Mass. 477 (A. D. 1872), and *Nash v. Hunt*, 116 id. 237 (A. D. 1874). In the former of these cases, it was held that persons acquainted with the testator, although neither witnesses to the will nor medical experts, may testify whether they noticed any change

Hardy v. Merrill.

in his intelligence, and any want of coherence in his remarks. GRAY, J., said: "The question did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. The question whether there was an apparent change in a man's intelligence or understanding, or want of coherence in his remarks, is a matter not of opinion but of fact, as to which any witness may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred."

In *Nash v. Hunt*, a witness was allowed to say he observed no incoherence of thought in the testator, nor any thing unusual or singular in respect to his mental condition, Judge WELLS saying: "We do not understand this to be giving an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness." The witness could state, "as matter of observation, whether his conversation and demeanor were in the usual and natural manner of the testator or otherwise;" and in *Commonwealth v. Pomeroy*, 117 Mass. 143, non-professional witnesses were allowed to state, without objection, that the prisoner, "in conversation and manner, evinced no remorse or sense of guilt."

With deference and great respect I may be allowed to say, that I rejoice much more in the results attained in these later cases than in the *modus operandi* of judicial reasoning by which the conclusions were reached. They indicate decided and accelerating progress of the Massachusetts courts in the right direction. The full establishment of the true doctrine there is a question of time only.

A tolerably careful investigation authorizes me to repeat the language of Judge DOE, that "in England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent, that it seems no English lawyer has ever presented to any court any objection, question, or doubt in regard to it." *State v. Pike*, 49 N. H. 408, 409.

I presume, however, it will not be denied that in the ecclesiastical courts, where questions of testamentary capacity are generally tried, such opinions have always been received. See 1 Greenl. Ev. (12th ed.), § 440, n. 4; *Dew v. Clark*, 3 Addams, 79; *Wheeler v. Alderson*, 3 Hagg. 574, where Sir JOHN NICHOLL said, in pronouncing his

judgment : " There is a cloud of witnesses who gave unhesitating opinions that the deceased was mad."

The practice in the courts of the common law has been universal and unwavering in the same direction ; and " the number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised." *State v. Pike*, 49 N. H. 409.

In the year 1800 James Hadfield was tried for shooting at King George III. The defense was insanity, and the opinions of non-expert witnesses were freely admitted (37 State Trials, 1281, *et seq.*), and Mr. ERSKINE told the jury they " ought not to be shaken in giving full credit to the evidence of those who * * * describe him as discovering no symptoms whatever of mental incapacity or disorder." Erskine's Speeches (3d London ed.), 132, 140.

In *Eagleton v. Kingston*, 8 Ves., Jr., 450, Ann Boak and Elizabeth Banson " expressed a strong opinion of the total incapacity of the deceased, both from his great imbecility of mind and the dominion * * * of Mrs. Kingston ;" and John Fogg testified that " his faculties were very much impaired."

In *Lowe v. Jolliffe*, 1 W. Black. 365, the subscribing witnesses to a will having sworn that the testator was utterly incapable of making such an instrument, to encounter this evidence the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity.

In *Tatham v. Wright*, 2 Russ. & Mylne, 1, Lord Chief Justice TINDAL, " in behalf of himself and the Lord Chief Baron," in reading the judgment of the court, commented upon the fact that " on the trial of this cause, for the purpose of proving affirmatively the general incapacity of Mr. Marsden, a very large body of parol evidence was produced by the defendants in the issue, comprising not fewer than sixty-one witnesses in number, some of whom deposed to the state of Mr. Marsden's intellect and the powers of his mind in very early life, and others continued the account down to a period very shortly before his death in 1826.

The greater part of this testimony came from non-professionals, and consisted in the expression of opinion.

Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates.

Hardy v. Merrill

But without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. See, in addition to the American cases cited by Judge DOE, in *State v. Pike*, *passim*, and the cases cited by the learned counsel for the appellant, in argument, *Commonwealth v. Dorsey*, 103 Mass. 412; *McIntyre v. McConn*, 28 Iowa, 480, 483; *Dickinson v. Dickinson*, 61 Penn. St. 401; *Boyd v. Boyd* 66 id. 283, 286, 290; *Pidcock v. Potter*, 68 id. 342; S. C., 8 Am. Rep. 181; 1 Whart. Cr. Law, § 48.

All evidence is opinion merely, unless you choose to call it fact and knowledge, as discovered by and manifested to the observation of the witness.

And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary), to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions.

But if a general rule will comfort any who insist upon excluding and suppressing truth, unless the expression of the truth be restrained within the confines of a legal rule, standard, or proposition, let them be content to adopt a formula like this: *Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained.* No harm can result from such a rule, properly applied. It opens a door for the reception of important truths which would otherwise be excluded, while, at the same time, the tests of cross-examination, disclosing the witness's means of knowledge, and his intelligence, judgment, and honesty, restrain the force of the evidence within reasonable limits, by enabling the jury

to form a due estimate of its weight and value. See 1 Redf. on Wills, 136-141.

Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity (*Commonwealth v. Sturtevant*, 117 Mass.); and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice.

The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. *Dewitt v. Barly*, 17 N. Y. 340; BELLOWS, J., in *Taylor v. Grand Trunk Railway*, 48 N. H. 304; S. C., 2 Am. Rep. 229.

How can a witness describe the weight of a horse, or his strength, or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions; because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances; because you cannot, from the nature of the case, describe emotions, sentiments and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description; the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person: "He seemed to be frightened;" "he was greatly excited;" "he was much confused;" "he was agitated;" "he was pleased;" "he was angry." All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual; appearances which are plainly enough recognized by a person of good judgment, but which he can no otherwise communicate than by an expression of results in the shape of an opinion. See Best on the Principles of Evidence, 585. It is on this principle, says Mr. Best, that testimony to character is received; as, where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that, from the general character of another witness, he ought not to be believed on his oath. Best on Ev. 657. "So," continues Mr. Best, "the state of an unproducible portion of *real* evidence—as, for instance, the

Hardy v. Merrill.

appearance of a building, or of a public document which the law will not allow to be brought from its repository — may be explained by a term expressing a complex idea, *a. g.*, that it looked old, decayed, or fresh; was in good or bad condition, etc. So, also, may the emotions or feelings of a party whose psychological condition is a question. Thus, a witness may state as to whether, on a certain occasion, he looked pleased, excited, confused, agitated, frightened or the like.”

Considerations of this character controlled the opinion of the court in *De Witt v. Barly*, before cited. The learned judge, in delivering the opinion of the court, said: “To me it seems a plain proposition that, upon inquiries as to mental imbecility arising from age, it will be found impracticable, in many cases, to come to a satisfactory conclusion, without receiving to some extent the opinions of witnesses. How is it possible to describe in words that combination of minute appearances upon which a judgment in such cases is formed? The attempt to try such a question, excluding all matter of opinion, would in most cases, I am persuaded, prove entirely futile. * * * A witness can scarcely convey an intelligible idea upon such a question, without infusing into his testimony more or less of opinion. Mental imbecility is exhibited, in part, by attitude, by gesture, by the tones of the voice, and the expression of the eye and face. Can these be described in language so as to convey to one not an eye-witness an adequate conception of their force?” — and see Rand’s note to *Poole v. Richardson*, 3 Mass. (Rand’s ed.) 330.

The reasons drawn from necessity in cases of this kind are enhanced by the obvious consideration, that oftentimes the testimony of experts, if it may be considered as possessing peculiar value, is, upon the required occasion, unattainable.

In very many forms of derangement, imbecility, idiocy, or more active insanity, the indications of mental disease being apparent to general and ordinary observation, a man of common sense and worldly experience can draw just inferences from them, as well without as with a scientific education.

The question of testamentary capacity is in strictness limited to a very brief period of time — the few minutes occupied by the attestation of the will. Evidence of a previous mental condition is, of course, competent, as tending to show that such previous con-

dition probably continued and existed at the precise moment in question.

But experts are not ordinarily employed, like a corps of detectives, to "work up" the case, by inquiries concerning conditions antecedent to the execution of the will; neither, I suppose, are they usually brought to the testator's bedside for the purpose of attesting the instrument. It has never been disputed that the subscribing witnesses may testify concerning the actual mental condition of the testator as freely as medical experts, who speak from personal and professional acquaintance, study, and investigation, whether these subscribing witnesses happen to be the attending physicians, nurses, children, or chance strangers; but why they are admissible, simply as subscribing witnesses, has never been explained satisfactorily; and no good reason, I apprehend, can be assigned for any distinction in this respect between subscribing witnesses and any other.

In *Beaubien v. Cicotte*, 12 Mich. 459, CAMPBELL, J., treating of this subject, says: "The reasons given by those courts which confine such testimony to these witnesses are based upon the assumption that they are called in for the special purpose of scrutinizing the capacity as well as the acts of the testator. It is matter of every-day experience, that wills made *in extremis* must usually be witnessed by any persons who are conveniently to be found; and it is not often that much care is taken to procure educated or peculiarly intelligent witnesses; nor is their attention, in fact, very closely addressed to the question of capacity, beyond what would naturally be the case with any other observers present.

But, be this as it may, the rule assumes that any person of ordinary capacity may form a reliable opinion concerning the condition of another, from simply witnessing the execution of a will which is rudely drawn up or discussed in the presence of the attesting witnesses. It is little short of absurdity to hold that persons, having equal or greater facilities derived from personal acquaintance and long intercourse, are not as competent to form opinions as those who are required to have no opportunity beyond one brief interview." See Mr. Rand's comments upon *Poole v. Richardson*, 3 Mass. (Rand's ed.) 330.

Now, as the question of the sanity or insanity of an individual is a question of conduct as well as a question of nosology, as a man is regarded as insane who acts in a way different from that of a ma-

Hardy v. Merrill.

jority of his fellows, it might well seem that the evidence of experts in such cases was inadmissible, since there can be no doubt that persons of common sense, conversant with mankind, and having a practical knowledge of the world, if brought into the presence of a lunatic, would, in a short time, be enabled to form an accurate and reliable opinion, not, perhaps, of the specific and precise character of his insanity as referable to a particular class of the insane malady, but, certainly, in a general way, of his mental unsoundness. See Browne on the Med. Jur. of Insanity, § 506. Dr. Ray (Med. Jur. of Insanity [5th ed.], p. 626) advises medical witnesses to be prepared with a well-ordered, well-digested, comprehensive knowledge of mental phenomena, in a sound as well as an unsound state, and recommends Shakespeare and Moliere as preferable text-books to Stewart and Locke, showing that it is the practical knowledge of character in its relation to conduct that he regards as the most important requisite, in the way of knowledge, of a medical witness.

I think it will be observed (and to my mind it seems that it must be inevitable) that wherever the rule is enforced, or rather attempted to be enforced, which allows only a recital of appearances to be given, it will be found that such facts inevitably involve opinions which the witness is unable to conceal, and which the utmost vigilance of judges cannot exclude.

These appearances are indeed facts, but they are facts which it is impossible to express, except in a way that shall indicate the opinion of the witness. Such opinions, as I have said, are, therefore, admitted *ex necessitate*.

It is impossible to prescribe the limits within which opinions are receivable, except by the application of this test: Is the employment of such testimony, from the nature of the case and its circumstances, the only way, or the best practicable way, of discovering the truth?

One hundred and thirty-one years ago, Lord HARDWICKE said, in *Omychund v. Barker*, 1 Atk. 19 (S. C., Campbell's Lives of the Chancellors, Hardwicke Ch. 131, vol. 6, p. 201, 5th Eng. ed.): "The judges and sages of the law have laid it down that there is but one general rule of evidence, 'the best the nature of the case will admit.'"

"The nature of the case" means, when employed in this connection, something more accurately described as "the nature of the subject." The authorities cited in *State v. Pike*, 49 N. H. 399, 409; S. C.,

6 Am. Rep. 533, and many others (to some of which I shall hereafter refer). show that the understanding and practice of English lawyers and judges always have been and now are perfectly unanimous on the question whether the nature of the mental conditions of calmness and excitement, peace and passion, love and hate, gentleness and ferocity, sobriety and intoxication, health and disease, is such that the opinions of non-experts, formed by personal observation of the appearance and conduct of an individual whose mental condition is a question, is the best evidence of that condition, within the meaning of the rule admitting the best evidence that the nature of the subject admits.

The meaning of the rule is best shown by examples. Nobody ever doubted that a non-professional man could testify that a certain neighbor, whom he had been accustomed to see, appeared one day to be well and the next day to be sick. Although the testimony of a physician, as to some of the details of the apparent health and sickness of that neighbor, might be more satisfactory, and, in a certain sense, better evidence, the opinion of the non-expert on the general question of health and disease, in that case, would belong to the class of the best evidence, within the meaning of the rule. And so, also, with regard to a question of mental condition; a medical expert may be able to state the diagnosis of the disease more learnedly; but, upon the question whether it had, at a given time, reached such a stage that the subject of it was incapable of making a will or a contract because irresponsible for his acts, the opinions of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country. BRESE, J., in *Rutherford v. Morris*, 77 Ill. 397.

In the case referred to, the opinions of sixty common-sense witnesses, neighbors of the testator, were received in preference to those of the experts, Judge BRESE remarking, "We feel confident that we will be more likely to arrive at a just estimate of the mental condition and business capacity of the testator by relying on the accordant testimony of his life-long acquaintances and neighbors, with whom the testator was in frequent intercourse, rather than from the testimony of these medical gentlemen; and so would the jury." On such questions the testimony of the expert and the testimony of the non-expert would both be the best evidence — that is, would be parts of the class of best evidence, within the meaning of the rule.

Hardy v. Merrill.

Nobody ever supposed that the rule of the best evidence admitted no opinions of physical condition except those of experts, and confined experts to a description of those physical appearances which were the evidence upon which they formed their opinion of the man's being well or sick.

If the language of the rule were required to be strictly interpreted, one expert would have to be excluded if it were made to appear that another expert was better qualified, because the testimony of the former would not be the best.

When the question is, upon a post-mortem examination and a dissection and chemical analysis of the stomach and its contents, whether the scientific indications in that organ were of the presence and action of arsenic or strychnia, the opinion of a mere lawyer, farmer, or blacksmith would not be the best evidence in any sense, but would be good for nothing ; and, as no one would think of asking their opinion on that physiological and chemical question, so no one would think of rejecting their opinion, based on their own observation of the deceased the day before his death, that he then appeared to be well or sick. Suppose, the day before or a week before the death, a lawyer, farmer, and blacksmith saw the deceased and had an opportunity to see whether he appeared to be well or sick ; suppose the lawyer is asked, " Did you observe any indications of his being well or sick ? " and the answer to be, " I observed no indication of his being sick ; he appeared as well as usual, as well as I ever saw him ; " suppose the farmer is asked, " Did you notice any thing unusual in his appearance or conduct ? " and the answer is, " No, I did not ; " suppose the blacksmith is asked, " In your opinion was he well or sick ? " and the answer is, " In my opinion he was perfectly well ; his spirits, looks, and behavior, all showed, in my opinion, freedom from weakness and pain ; " what legal distinction can be drawn between these questions and answers, to make one competent, and either of the others incompetent ? It is all opinion, and nothing but opinion, of the man's physical condition in relation to health or disease. The use or the omission of the word " opinion," in either of those questions or answers, does not affect the character of the testimony in the slightest degree. Calling such testimony " opinion " does not make it " opinion ; " and calling it something else (as in *Barker v. Comins*, and *Nash v. Hunt*, before cited) does not make it something else. It is opinion, not because the word " opinion " is used, but because

it is the judgment of the witness, exercised upon what he personally saw and heard of the deceased, and the conclusion of his own mind upon the question of physical health or disease a conclusion formed by the witness, not by the jury, and formed upon sights and sounds which enabled the witness to form an opinion satisfactory to himself, although it is one which he might be unable to describe to a jury so as to enable them to form as satisfactory an opinion as they would if they had seen and heard what the witness saw and heard; and such evidence is more valuable than the testimony of experts unacquainted with the testator. See Redf. Cases on the Law of Wills, 89.

When the witness describes what he saw and heard as well as he can, his description may (as it often must) fall far short of being the best evidence. *State v. Pike*, 49 N. H. 399, 415, 423. When he adds to his description the impression made upon his own mind by the things, appearances, and transactions described, the jury have evidence of the class called the best, though it may not be so good as the opinion of a skillful physician. The rule requiring the best evidence relates to its grade only, and not to its conclusiveness. Thus, the evidence of a bystander is competent to prove where lines were run in a private survey, though the surveyor be living. *Richardson v. Milburn*, 17 Ind. 67. As the opinion of one expert may be better than the opinion of another expert, so the opinion of one farmer may be better than that of another farmer in relation to the quality of a load of hay; but, coupled with such a description of the hay as they can give, their opinions of its quality are both of the class of evidence called the best, although the fact that well-fed cattle ate the hay very greedily, or that half-starved cattle would not eat it at all, would be better evidence than the opinions or the descriptions given by the farmers. The opinion of one farmer would not be excluded because the opinion of another was better; and both their opinions would not be excluded because the opinions of the cattle would be better than either of theirs.

In *Darling v. Westmoreland*, 52 N. H. 401, 403; S. C., 13 Am. Rep. 55, the defendants, arguing that evidence of Fletcher's horse being frightened was incompetent, suggested that, "at best, it was evidence of an admission or a declaration, by Fletcher's horse, that the alleged obstruction looked frightful to him, and * * * not even a declaration under oath at that." But the court, holding that the fright of Fletcher's horse was as competent as the fright

Hardy v. Merrill.

of the plaintiff's, affirmed the doctrine of *Whittier v. Franklin*, 46 N. H. 23, that the fright of a horse might be proved by witnesses testifying that he "appeared to be frightened, or that in their opinion he was frightened, or (to omit superfluous words, and speak in that positive manner in which witnesses would generally testify on such a subject) that he *was* frightened," p. 403.

A non-expert may testify that he thought a horse "was not then sound: * * * his feet appeared to have a disease of long standing" (*Willis v. Quimby*, 31 N. H. 485, 487); that a horse "appeared to be well and free from disease;" that he thought "he never saw any indication of the horse being diseased." *Spear v. Richardson*, 34 id. 428-431. These two cases relate to the physical condition of a horse. The same doctrine is equally well settled in relation to the mental and moral condition of a horse, so to speak; for, in *State v. Avery*, 44 N. H. 392, 393, it was held (BELLOWS, J.) that a non-expert might testify, on an indictment for cruelly beating a horse, that the horse drove like a pleasant and well-disposed horse, unless when harassed by the whip; that at the time of the beating, he saw no viciousness or obstinacy in the horse, and that the blows appeared to affect the horse in a particular manner. The evidence was opinion, and nothing else; and it was opinion of the mental and moral condition of the horse, judged of by the witness from actions which it was impossible for the witness to describe in any better or more satisfactory way, so as to give the jury the best evidence the nature of the subject permitted.

In *Whittier v. Franklin*, 46 N. H. 23, an action for a defective highway, one point of the defense being that the plaintiff's horse, which he was driving at the time of the accident, was vicious and unsafe, and that the plaintiff's injuries were caused by the vices of his horse, it was held, BELLOWS, J., delivering the opinion of the court, that a non-expert who witnessed the accident might testify that he did not see any appearance of fright; that the horse did not appear to be frightened in the least before he went off the bank, or afterward; that he appeared to be rather a sulky dispositioned horse to use." Judge BELLOWS cites *People v. Eastwood*, 14 N. Y. 562, where it was held that opinions as to whether a person is intoxicated may be received; *Milton v. Rowland*, 11 Ala. 732, opinions as to the existence of disease, when perceptible to the senses; *Bennett v. Fail*, 26 Ala. 605, opinion that a slave appeared to be

Hardy v. Merrill.

healthy; and other cases in relation to opinions of a healthy or sickly condition of body. He also cites *Spear v. Richardson*, and *Willis v. Quimby*, before referred to, as to opinion of health of horses. The very learned judge says that the substance of the statement of the witness is that the horse did not appear to be frightened, but appeared to be sulky; that, on such subjects, persons of common observation may and do form opinions, that are reasonably reliable in courts of justice, from marks and peculiarities that could not in words be conveyed to the minds of jurors, to enable them to make the just inferences; that it is much like the testimony that a horse appeared well and free from disease, or that a person appeared to be healthy, or intoxicated, p. 26. The evidence was held admissible as an *opinion*.

What reason is there for allowing a witness to testify that a horse appeared to have a sulky disposition, and not allowing the same witness to testify that a man appeared to have a similar disposition? What difference whether the witness says, "He appeared to have a sulky disposition," or, "In my opinion, based upon my own observation of him, he had a sulky disposition?"

A non-expert may give his opinion on the physical health of a man, as well as on the physical health of a horse (*State v. Knapp*, 45 N. H. 148-150); may give his opinion not only that a horse did not appear to be frightened, but also that a lady did not seem to be frightened or excited. *Taylor v. Railway*, 48 id. 304, 306, 309.

The opinion of non-experts in relation to mental condition is not limited to the question of a mental disturbance caused by fright. In *Bradley v. Salmon Falls Manuf. Co.*, 30 N. H. 487, 491. it was held that a non-expert might testify that the plaintiff "seemed satisfied" with a business arrangement proposed to him by the witness.

In *McKee v. Nelson*, 4 Cow. 355, it was held that, in an action for a breach of promise of marriage, a witness who knew the plaintiff and had observed her conduct and deportment toward the defendant, was permitted to express his opinion that the plaintiff was sincerely attached to the defendant; "a fact," said Judge SELDEN, "which it is plain could be proved in no other way;" and this decision was cited as undoubted law by Judge PARKER in *Robertson v. Stark*, 15 N. H. 114, 109. In *McKee v. Nelson*, the court say "There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify;"

Hardy v. Merrill.

precisely what Judge BELLOWS, in *Whittier v. Franklin*, said of the frightened mental condition and sulky disposition of a horse.

Better illustrations, I think, could not be had of the meaning of the rule, admitting the best evidence.

A boy works many years on a farm, and the question arises, what was the value of his services? Suppose he is dead, as is the subject of inquiry in this and every testamentary case, one of the material questions would be whether the boy was bright or stupid, amiable or morose. What evidence on these points would be so satisfactory as the opinions of the intelligent and disinterested farmers in the neighborhood, who knew him well? If there was a general concurrence in their opinions, one way or the other, would it not be decisive? and, if there was not a concurrence, would not the cross-examination as to the grounds and reasons of their opinions generally show the facts much better than any statement of facts without opinions?

What facts without opinion can any parent state as to his own children, to give a stranger any such tangible and satisfactory information of their mental and moral peculiarities as is given by an expression of his opinion?

Of very many states of mind, as we have already seen, the opinions of non-experts are competent evidence. What lawyer of considerable experience or observation, in the courts of this or any other jurisdiction, has not heard such evidence given without objection, and no objection made, because every lawyer and judge felt that it was the best evidence?

A man is tried for the murder of his wife. It is material to know how his mind was affected when he was first informed of her death. A witness, who says he told the prisoner of it, is asked how the prisoner was affected. The answer is, "He was very much overcome;" or, "He seemed very much overcome;" or, "I thought he was deeply affected;" or, perhaps, "The news did not disturb him at all;" or, "He showed no signs of grief;" or, "I saw no indications of sorrow;" or, "He seemed depressed and gloomy." Did anybody ever object to such evidence? and, if any objection was ever made on the ground that it was a matter of opinion, was the objection ever sustained? Was such evidence ever excluded here or anywhere else? Evidence of this character was received a few weeks ago, in the trial of Magoon, for murder, in Rockingham county, without the intimation of a doubt concerning its com-

petency ; and the very able and vigilant counsel, upon both sides, in that cause, knew what they were about, and omitted nothing of their duty to the prisoner or to the public.

And such evidence is not confined to the various mental conditions of health ; it is also received in relation to mental disease. They who attended the death-bed of a testator are called to testify concerning his mental condition. One says : "A week before his death he was sick and confined to his bed — very weak — not able to sit up, but in other respects he appeared as usual." "As usual" means, in such a case, sane, sound in mind, of a healthy mental condition. "He appeared natural," is the universal expression of ordinary witnesses testifying to sanity. "If 'unnatural,' by its peculiar use in this connection (said Judge DOE), should, in evidence, come to be synonymous with 'insane,' as 'natural' is understood to be synonymous with 'sane,' the legal question now under consideration would dwindle to a point of literary taste." *State v. Pike*, 49 N. H. 427 ; and see *Boardman v. Woodman*, 47 id. 146.

But one witness says: "He did not appear as usual ; he did not appear natural." Now let us imagine a scene that might very probably be exhibited in any court where the Massachusetts rule prevails :

"Very well," says a learned barrister, "very well, Mr. Witness, you may say that, that is quite regular, that is your opinion. Now tell us in what respect he did not appear 'as usual,' or 'natural.' " "Well, I can't describe it, but I should call it wandering, delirious ; he was incoherent in his talk." "Very well, Mr. Witness, you acquit yourself like a sensible man. Now tell the jury whether, in your opinion, he was then of sound mind." "I object !" thunders the learned barrister on the other side. "I object !" exclaims the opposing junior — "counsel know better. It is an insult and outrage to put such a question." "I object !" "I object !" echoes from every side. The court-room is in an uproar. The judge has to exert himself to restore order and keep the peace. The lawyers on each side are all talking at the same time in a very delirious and incoherent manner. The witness is confounded. The jury are confounded. Everybody is confounded, except those who understand that "incoherence of thought" and "delirium," vulgarly called "wandering," is not a state of mental unsoundness, is not mental disease ; and that "as usual," or "natural," is not

Hardy v. Merrill.

a condition of mental health. Whether it is such condition or not, is a question then solemnly debated. After a profound discussion by counsel, and a thorough consideration by the judge, he rules that the witness may say that the deceased was delirious, but must not say he was of unsound mind, because the witness, not being an expert, is not qualified to form an opinion on the general question of mental health or mental disease.

That ruling is made in Maine (because it was once a part of Massachusetts), in New Hampshire, in Massachusetts, and in Texas (*Gehrke v. The State*, 13 Tex. 568), and nowhere else in the civilized world.

At the close of the scene which I have described, not a man of the laity goes out of the court-room without being disgusted with this exhibition of the law, as a system of arbitrary rules, that, ignoring all legal ideas, decides upon a distinction purely verbal. And why should not the laymen be disgusted with the senseless subtlety which permits one party to show by his witness that a testator "appeared perfectly natural," and forbids the adverse party to offer the testimony of another witness that "he didn't appear to be in his right mind?"

In the case now before us, the learned judge and his associates, to whom the trial was referred, evidently and inevitably experienced great embarrassment and confusion of mind in their effort to conform to the supposed rule. The futility of their endeavors is notably apparent.

Mr. McAlpine was permitted to say of the testator, "He seemed to be all broken down in body," but was forbidden to say, "He seemed to be all broken down in mind;" and yet, the same witness (without specification of mental or bodily infirmity) was permitted to say that, between certain dates, "he had changed very much;" "his mind was such that he could not give any intelligent answer;" "he didn't seem to have any memory;" "I discovered that he had failed;" "his conversation was childish."

The following questions were ruled out:

First. "Being a brother of Joseph Hardy, for your observation of his appearance and conduct at the time you saw him at your house, in June, 1869, state whether or not, in your opinion, he was at the time of sound and disposing mind and memory."

Second. "Being a brother of the testator, from what you had observed as to his conversation, conduct, and general deportment

as to all subjects, up to the 26th day of July, 1870, have you any opinion as to his sanity at that date, and if so, what is it ?”

Mr. Hardy was not allowed to say that the testator “appeared like a failing man in every respect.”

Another witness was forbidden to testify that the testator “appeared like a man who didn’t seem to know what he was talking about half of the time ;” but he was allowed to state that “he appeared very weak in his mind.”

Another non-expert was permitted to testify, “He appeared child-like, appeared feeble in body and mind, more like a child than a rational man ;” but another witness was not allowed to state, “It looked to me as though he was failing in his business capacity, or in his mind.”

And, finally, another witness, being expressly cautioned and charged to beware of expressing any “opinion,” was permitted to say, “I observed nothing whatever, in his conduct or conversation, indicating any impairment of any of his mental faculties.”

The Massachusetts rule is, that non-experts’ opinions shall be excluded ; but the rule itself does not exclude them. It only excludes the use of certain words. It admits the opinions, and merely embarrasses the witness and confounds the jury by requiring the witness to express his opinion without using certain forbidden terms, and by using others that are understood by the jury and everybody else to be precisely synonymous. A non-expert, who had been watching by the bedside of a sick man, may say, “He was delirious all night ;” a farmer may say that his neighbor’s boy is so lacking in intelligence as to be “below par ;” anybody may say that a man was “crazy drunk ;” that a testator didn’t seem to understand any thing that was said to him, seemed senseless, unnatural, not as usual ; or, that “no change was perceptible in his intelligence,” “no incoherence of thought,” nor any thing unusual or singular in respect to “his mental condition ;” was healthy or sickly in body ; but in giving his opinions of mental health or disease, the non-expert must not use the words “sane,” “insane,” “mentally disordered.” or “deranged.” So far as he can find synonymes for these words, circumlocutory but equivalent, he may express his opinion in them, and welcome ; but let him beware of using those cabalistic words, on pain of the displeasure of those who understand that such terms as “delirious” and “idiotic” are not ex-

Hardy v. Merrill.

pressive of an opinion of the presence and operation of mental disease.

Whether "out of his head" is one of the phrases in which a non-expert may give his opinion, or whether it is one of the forbidden caballa, is a question concerning which information is wanting.

The selection of the phraseology in which such an opinion may be expressed, and that in which it cannot be uttered, depends on no legal principle, but on the mere whim of the court. Such an arbitrary and senseless choice or rejection of terms in which to express an admissible opinion, is mere, sheer logomachy, a waste of precious time given us for better purposes, a verbal quibble unworthy of the law, and calculated to bring it into contempt.

It would be superfluous for me to add that I fully concur in the views and opinions expressed by Judge DOE in *Boardman v. Woodman* and *State v. Pike*, and that I cordially indorse the remarks of Judge REDFIELD (11 Am. Law Reg., n. e, p. 259), as follows: "The learned judge shows very conclusively, both upon authority and reason, that the opinion of the unprofessional witnesses, in such a case, is commonly far more reliable as a basis of ultimate decision, in questions of sanity and mental capacity, than any specific facts which could possibly be gathered from the witnesses. We have said in our book on Wills, and in other places, all that we could desire to say, both as to the rationale of the rule, and the support which it receives from authority. The tendency of the American courts in the last few years has been largely in the direction contended for by the learned judge; and there seems to be little question that it must ultimately prevail all but universally. We should rejoice at such a result, as greatly tending toward the establishment of truth with greater facility and certainty in a very important class of cases." See 1 Redf. on Wills (4th ed., A. D., 1876) 138-145, where many other cases than those hereinbefore alluded to are cited and commented upon.

Thus supported upon principle and authority, I am satisfied that the time has arrived when this court is called upon to declare the law to be in conformity with the views I have expressed.

LADD, J. I think it is shown by proofs which fall little, if at all, short of demonstration, that the doctrine excluding the opinions of non-experts on the question of insanity has grown up in this State within the memory of men now living in the profession; that

Rowe v. Portsmouth.

it had no place in the common law brought here from England, nor in the jurisprudence or practice in this State, from the Constitution down to a comparatively recent date ; that it is contrary to reason, extremely difficult of application, and inconvenient in practice ; that the great weight of judicial opinion and authority outside this State is against it ; and that, even if we look at the condition of authority as shown by the expression of judicial opinion and practice in this State, the balance cannot fairly be said to be in favor of the rule. No titles are to be disturbed by adopting a rule more consonant with reason, and which accords with the almost universal practice in jurisdictions where the common law is used the world over. I, therefore, concur fully with my brother FOSTER in the conclusions at which he has arrived.

CRSHING, C. J., concurred.

Case discharged.

ROWE V. PORTSMOUTH.

(56 N. H. 291.)

Municipal corporation — liability for injuries occasioned by a sewer.

A city constructed a sewer so unskillfully that it became obstructed and caused water to set back on to plaintiff's premises to his injury. *Held*, that the city was liable.

In maintaining a public sewer a city is bound to use the same degree of care and prudence as would be required of an individual.

Although a municipal corporation be not required by law to build sewers, yet if it have authority to build them, and voluntarily undertake to do so, it will be liable for any injury occasioned by its negligence or misfeasance, either in building or maintaining them.*

ACTION on the case against the City of Portsmouth to recover damages occasioned by a flow of water into the cellar of plaintiff's house from defendant's sewer. Plea, the general issue. The case was referred to a referee, who reported the following facts: The defendant had for more than twenty years a common sewer through Hanover street, on which plaintiff's property was situated,

* See *Van Pelt v. Davenport*, 20 Am. Rep. 622, and note; *Detroit v. Beckman*, post, and note.

and the plaintiff's cellar was drained by a private drain leading of right into the said sewer.

In 1867, the defendant built a new common sewer one foot in diameter. In building it, defendant found, a short distance below plaintiff's house, a waterpipe one inch in diameter, running across the proposed course of the sewer at right angle; whereupon the sewer-pipe was cut, and the water-pipe was passed through the center of the sewer-pipe.

In July, 1872, in consequence of a parasol or sunshade floating down said sewer, and catching in said water-pipe, the sewer became obstructed and choked up at that point, so that after showers the water, on several occasions, flowed back through plaintiff's drain into his cellar, causing the damage complained of. The plaintiff each time notified the city marshal, but it did not appear whether the marshal notified any other city officer until the last time, when he notified the mayor and one of the aldermen, whereupon the sewer was examined and the obstruction removed. Said obstruction would not have happened had said water-pipe not been allowed to run through the defendant's said sewer; but said sewer, as constructed, was sufficient for the purpose of carrying off the water had said obstruction not occurred as above stated. There was no evidence to show in what manner said parasol or sunshade entered said sewer. The city had authority to construct the sewer and to require all persons to pay a reasonable sum for the right to open any drain into a common sewer. Upon the foregoing facts the referee found that the defendants were guilty in manner and form as the plaintiff had declared against them, and assessed damages in the sum of \$253.80.

Upon the return of said report, the plaintiff moved for judgment thereon in her favor for the amount found by the referee, and the court *pro forma* granted the motion, to which the defendant excepted.

The questions arising on the foregoing statement of facts and ruling of the court were transferred to this court by STANLEY, J.

Frink, for plaintiff.

Hodgdon, for defendants.

SMITH, J. The defendants raise three questions upon the report of the referee: (1) That no action will lie against a city for neglect

to build or repair a sewer; (2) that if such action will lie, a city is answerable only for neglect to use ordinary vigilance and care to keep its sewers open and free from obstruction; and (3) that the defendants did not receive seasonable notice of the obstruction to prevent the injuries which the plaintiff has received.

By chapter 44, section 9, General Statutes, it is provided that "city councils shall have power to construct drains and common sewers through highways, streets, or private lands, paying the owners such damages as they shall sustain thereby; said damages to be assessed by the mayor and aldermen in the same manner and with the same right of appeal from their decision as in case of the laying out of highways; and may require all persons to pay a reasonable sum for the right to open any drain into any public drain or common sewer." This section is an exact re-enactment of section 21 of the act to establish the city of Portsmouth, approved July 6, 1849, under the authority of which the defendants must have rebuilt their sewer in Hanover street in the year 1867, the general statutes not taking effect till January 1, 1868. The statute authorized and empowered the defendants to construct public sewers, but did not impose that duty upon them. It was optional with the defendants whether they would or would not take the benefit thus conferred upon them. This authority the defendants accepted when they accepted their charter in 1848, under the provisions of section 21; and it needs no argument to show that a city which constructs sewers under the authority of a statute, virtually accepts the power therein conferred, and will not be admitted to allege the contrary. This case, therefore, is not to be distinguished from *Child v. Boston*, 4 Allen, 41, upon the question of acceptance by the defendants of the statute conferring the authority to construct sewers. When, then, the defendants made their election by accepting the act of 1847, and by executing the powers therein granted, and also granted by the general statutes, and received pay from the plaintiff for opening her drain into their public sewer, the question arises, whether they are liable to her for injuries sustained by her by reason of their neglect to keep their sewers in proper repair.

Under what circumstances a municipal corporation will be held liable to an individual suffering injuries from the neglect of such corporation to perform a public duty, was very fully discussed by PERLEY, C. J., in *Eastman v. Meredith*, 36 N. H. 284. In that case it was decided that though a town-house, which was erected by

Rowe v. Portsmouth.

a town, was so defectively constructed that when a town-meeting was held in it the floor broke down and a voter was thereby injured, yet he could not maintain an action against the town to recover damages for the injury. But the learned chief justice remarks : “ Grants are sometimes made to particular towns or cities of special powers not belonging to them under the general law ; and there is a class of cases in which towns and cities have been held liable to civil actions for damages caused by neglect to perform public duties growing out of the grant of such special powers, as the power to bring water by an aqueduct for public use by those who pay a compensation for it, to light the place with gas on the same terms, or to make and maintain sewers at the expense of adjoining proprietors. Thus, in *The Mayor, etc., of New York in error v. Furze*, 3 Hill, 612, the city was empowered by special act to lay down and maintain sewers, and charge the expense upon owners and occupiers of houses and lots intended to be benefited ; and it was held that an individual might maintain an action against the city to recover damages for a private injury which he had suffered from neglect of the city to keep the sewers in proper repair. The distinction between the liability of towns and cities for neglect to perform public duties growing out of the powers which they exercise under the general law, and their liability when the duty arises from the grant of some special power conferred on the particular town or city, is recognized or explained in *Bailey v. Mayor, etc., of New York*, 3 Hill, 531.”

Judge PERLEY further says, p. 293 : “ In such cases the special powers thus granted are not held by the particular town or city under the general law, and as one of the political divisions of the country. The public duty grows out of the special grant of power, and though held and exercised by a town or city, the nature of the power granted is the same as if a like power had been conferred on a private corporation created to answer the same public object ; and the cases above referred to hold the town or city liable to a civil action for neglect to perform a public duty arising from the grant of the special power in the same way, and, as I understand them, upon the same grounds and reasons as private corporations are held, which are clothed with the same powers and bound to the performance of the same public duties. So far as I have had opportunity to examine this class of cases, they appear to go upon the ground that the special power, though no direct pecuniary profit

may be derived from it, is granted as an immunity and peculiar privilege for the benefit of the particular town or city, and is accepted, as in the case of a private corporation, upon the implied condition of performing the public duties imposed by and growing out of it. *Henley v. Lyme Regis*, 1 Bing. N. C. 222; *Mears v. Wilmington*, 9 Ired. 73; *Mayor, etc., of New York v. Bailey*, 2 Den. 433."

It is well settled that a private action cannot be maintained against a town, or other *quasi* corporation, for a neglect of corporate duty, unless such action be given by statute. *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 187; *Mower v. Leicester*, 9 id. 247. "This rule of law, however, is of limited application. It is applied, in case of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is conferred on it at its request. In the latter cases, a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed or the same authority were conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents." *Bigelow v. Randolph*, 14 Gray, 541.

Child v. Boston, 4 Allen, 41, is a case much in point, where it was held that sewers when constructed become the property of the city, and the duty of keeping them in repair devolves on the city; and the city is responsible for negligently suffering them to occasion a nuisance to the estates of the citizens whose private drains enter into them, if the nuisance does not result from their original plan of construction, and could be avoided by keeping them in proper condition. The plaintiff's drain entered the defendant's common sewer, which had its outlet in the south bay at the depth of some feet below high water. By means of a waste-weir the sewer was constructed to discharge into the empty basin in the back bay when the outlet into the south bay was closed by the tide, and the water in the sewer had risen high enough to reach the waste-weir. The proprietors filled in against the sewer in the back bay, thereby preventing the discharge through the waste-weir, and the plaintiff's premises were flowed in consequence.

Rowe v. Portsmouth.

HOAR, J., remarked: "Here a special authority was conferred and accepted, involving important relations to individual proprietors of land, and entire control of an easement of such a nature that negligence might not only deprive those interested of a benefit which it was designed to afford, and for which they had paid, but produce consequences actively and directly pernicious. The duty to keep the sewer free from obstructions was a ministerial duty, and the defendants were liable for negligence in its exercise to any person to whom their negligence occasioned an injury."

Judge Cooley, in his work on Constitutional Limitations, 248, says: "The grant by the State to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise on the part of the corporation to perform the corporate duties; and this implied contract, made with the sovereign power, inures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise on condition of the performance of certain public duties, are held to contract, by the acceptance, for the performance of those duties." The authorities are very unanimous in support of this doctrine, and are cited on p. 248 of Mr. Cooley's work.

As to the second and third questions raised by the defendants, the rule in such cases is stated in *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, to be, that "a city is bound to exercise that care and prudence which a discreet and cautious individual would or ought to use if the whole loss or risk were to be his alone." In *Hume v. The Mayor, etc., of New York*, 47 id. 639, it is said: "The city authorities are not bound to be experts, or skilled in mechanics and architecture, and can only be held to the extent of reasonable intelligence and ordinary care and prudence." *Rockwood v. Wilson*, 11 Cush. 221. In *Johnson v. Haverhill*, 35 N. H. 74, which was an action against the town for an injury resulting from an alleged defect in a highway, it was held that the question of negligence on the part of the town does not arise except incidentally, as it is involved in the question whether the defect exists, and this latter question may depend upon the manner in which the defect originated, and the circumstances of its continuance. In such case the question of negligence is a material inquiry. And where an obstruction exists by reason of inevitable

accident, without fault or negligence on the part of any person, it is not an obstruction within the meaning of the statute unless the town had notice of it, express or implied, and reasonable opportunity, by the exercise of proper care and vigilance, to have removed it before the accident occurred. It is well settled that a municipal corporation is not liable for injuries caused to individuals by obstructions on the highway not placed there by its own officials or by authority of the city government, until after actual notice of their existence, or until, by reason of the lapse of time, it should have had knowledge, and, therefore, actual notice may be presumed. *Hume v. New York*, *supra*, 646; *Colley v. Westbrook*, 57 Me. 181; *Hunt v. Brooklyn*, 35 Barb. 226; *Cooley*, p. 249.

The case does not show that the referee did not apply these rules in weighing the evidence laid before him, and in coming to the conclusion which he reached. We cannot say, as matter of law, from the facts presented by the report, that the defendants did not act with the care and prudence that a discreet and cautious individual would, if the whole loss or risk were to be borne by him alone. There is evidence tending to show that the thing which caused the obstruction in the sewer had been there for such a length of time that notice to the defendants must be presumed. But these were questions of fact, to be found by the referee according to the particular circumstances of this case. *Johnson v. Haverhill*, *supra*; and it is to be presumed, in the absence of any evidence to the contrary, that he applied the law correctly to the facts.

CUSHING. C. J. The case of *Eastman v. Meredith* was very elaborately and carefully considered by the late Chief Justice PERLEY. From that case, and the authorities cited by my brother SMITH, it seems to me well established that this is one of that class of cases in which a corporation would be liable at common law for a neglect of its duty.

Some question has been made in the argument about the sufficiency of the notice to the city of the defect in the sewer, and it is claimed that the city marshal was not the proper officer to receive the notice. In the case of *Howe v. Plainfield*, 41 N. H. 135, which was an action for damages occasioned by a defect in a highway, the defendants offered to show that the selectmen had no notice of the defect. The testimony was excluded, and it was held to have been rightly excluded, the court putting the matter upon the ground

Rowe v. Portsmouth.

that, if the defect had existed for a sufficient length of time to give reasonable opportunity to ascertain and repair it, the town was liable, whether the selectmen had notice, express or implied, of its existence or not. The true theory of the law seems to be, that, in matters of this kind, every corporator ought to interest himself in taking notice of defects and bringing them to the knowledge of the authorities, and that, whenever the jury is in condition to say that the corporation ought to have taken notice, it will be held liable. I think we must infer that the referee found, from the notice to the city marshal, which tended to give notoriety, from the length of time which had elapsed, and from all the circumstances, that the defendants had been guilty of neglect. I think, therefore, there should be judgment for the plaintiff on the report.

LADD, J. I, also, think there should be judgment on the report for the plaintiff. Certain facts were reported by the referee, for what purpose does not very clearly appear, and judgment was rendered by the court below for the plaintiff in accordance with the general finding of the referee. The defendants excepted to the order for judgment against them. I understand the ground they take to be, first, that there was no evidence from which the referee could legally find the damage was caused by any want of reasonable and ordinary care on the part of the city with respect to the sewer; and, second, that if there was such evidence, still they are not liable, according to the doctrine of *Eastman v. Meredith*, 36 N. H. 284.

The first position is certainly without foundation. It is entirely clear that there was evidence from which the referee might well find fault, and negligence in the original construction of the sewer, and negligence in not removing the obstruction before the injury happened.

The second point is undoubtedly one of more intrinsic difficulty. The defendants were not bound by law to construct the sewer, and herein the case differs entirely from that of an injury caused by a defect in a highway. They were, however, authorized to construct it, and voluntarily undertook that service. The plaintiff's cellar was drained into the sewer "of right," as the case finds; so there is no pretense that her legal rights had been forfeited or impaired by her own act. It does not appear whether this right to drain her cellar into the common sewer was of such a character that she

could compel the defendants to keep up the sewer for that purpose, nor whether the right was obtained by the payment of a reasonable sum to the city, as provided by Gen. Stats., ch. 44, § 9; but, in the view I take of the case, neither of these things is material. It is material that she did not, without right, open her drain into the sewer.

As to the application of *Eastman v. Meredith*, it appears to me the cases are not parallel. There it was held that, where a building erected by a town for a town-house was so imperfectly constructed that the flooring gave way at the annual town-meeting, and an inhabitant and legal voter, in attendance on the meeting, received thereby a bodily injury, he could not maintain an action against the town to recover damages for the injury.

The decision was placed entirely on the peculiar nature of the obligation of a town to provide a safe place in which to hold town-meetings. That duty is not imposed by statute, nor by contract. It is not an enterprise undertaken by the town for gain. It is at most a public or political duty, and the right of the citizen that it shall be properly performed is a public or political right.

The court say: "We regard the present case as one of new impression. We have heard of no earlier attempt in this State to maintain an action against a town for a private injury suffered by a citizen of the town from neglect of the town to provide him with safe and suitable means of exercising his public rights, and we are, not informed of any case in which such an action has been maintained in any other State."

Nearly the whole of the elaborate opinion of the court is occupied with showing the distinctions between that case and cases bearing a very strong resemblance to the present.

The question, whether municipal corporations in this country, and corporations in England, having some of the powers and charged with some of the duties usually exercised by municipal corporations here, are liable for negligence, carelessness, or misfeasance, both in the performance of their legal duties and the doing of voluntary acts within the scope of their authority, has been much considered by the courts on both sides of the Atlantic; and the decided weight of modern authority is, that in this respect they stand like private individuals or corporations. The English cases on this subject are very thoroughly and carefully reviewed by BLACKBURN, J., in *Mersey Docks Trustees v. Gibbs*, L. R., 1 H. L.

Rowe v. Portsmouth.

93. That was an action against the Mersey Docks Board of Trustees, a corporation created by act of Parliament, with power to build docks at Liverpool and secure dock rates, which rates they were bound by the statute to apply wholly to the maintenance of the docks and the payment of a very large debt contracted in making them. The plaintiff's vessel, while entering one of the docks, ran upon a bank of mud which had been suffered to accumulate at the entrance of the dock, and was damaged. It was held that the principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators, or to that of the corporation, but are devoted to the maintenance of the works, and in case of any surplus existing, the tolls themselves are to be proportionately diminished. This case, decided in 1866, shows most clearly the state of the law in England on this point at the present time, and is very much in point.

There was evidence here from which the referee might find want of due care in the construction of the sewer, and that the damage happened by reason thereof.

In *The Mayor, etc., of New York v. Bailey*, 2 Den. 433, it was held that a municipal corporation is responsible for the negligence or unskillfulness of its agents and servants, when employed in the construction of a work for the benefit of the city or town, subject to the government of such corporation. The action was for injury occasioned by the negligent and unskillful construction of a dam on the Croton river, being part of the public works built pursuant to a statute for supplying the city with pure and wholesome water.

In *The Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, the corporation of the city of Rochester, having power to cause common sewers, drains, etc., to be made in any part of the city, directed a culvert to be built, for the purpose of conducting the water of a natural stream which had previously been the outlet through which the surface water of a portion of the city had been carried off. A freshet having occurred, the culvert, in consequence of its want of capacity and the unskillfulness of its construction, failed to discharge the waters, so that they were set back upon the factory of the plaintiffs, and injured their property situated therein.

Held, that the city corporation was liable for the damages. And the doctrine was laid down, that an ordinance of a city corporation, directing the construction of a work within the general scope of its powers, is a judicial act for which the corporation is not responsible; but the prosecution of the work is ministerial in its character, and the corporation must, therefore, see that it is done in a safe and skillful manner.

There was, also, in the present case, as already suggested, evidence from which the referee might find negligence in not removing the obstruction from the sewer before the injury occurred; and my opinion is that this also furnishes legal ground upon which the award of the referee should be sustained.

The case of *The Mayor, etc., of New York v. Furze*, 3 Hill, 612, is in point. It was there held that the corporation of the city of New York are bound to repair the sewers, etc., constructed by them; and, if an inhabitant be injured by reason of their neglect in this particular, he may maintain an action against them for his damages.

Another strong case of the same description is *Child v. Boston*, 4 Allen, 41, where the city was held responsible for negligently suffering the common sewers to occasion a nuisance in the estates of the citizens whose private drains enter into them.

A large number of cases bearing in the same direction may be found in *Shearman & Redfield on Negligence*, §§ 120, 144, 151, 579.

The point as to want of due care and skill in the original construction was decided by this court in the recent case of *Gilman v. Laconia*, 55 N. H. 130; S. C., 20 Am. Rep. 175.

I think the defendants were bound to the exercise of ordinary care and skill, both in constructing and maintaining the sewer, and that, for any injury which happens to the estate of a citizen from a failure in that respect, they are responsible.

Judgment on the report for the plaintiff.

Bixby v. Dunlap.

BIXBY v. DUNLAP.

(56 N. H. 456.)

Master and servant — action for enticing away servant — damages.

A master may maintain an action against any one who knowingly and willfully entices away his servant; and may recover exemplary damages therefor. (See note, p. 485.)

ACTION on the case for enticing away plaintiff's servant. Plea, not guilty. The declaration contained five counts, alleging, in various forms, this in substance: that one Albertina Larson was the servant of plaintiff under a valid contract, of which the defendant had knowledge, and that the defendant did unlawfully, wrongfully and unjustly entice, persuade, and procure said servant to violate her said contract, and to depart from the said plaintiff's service, and to enter into the service of the defendant.

It appeared from the evidence that one Bergland was engaged in the business of bringing servants from Sweden to America; that in the fall of 1871, plaintiff, Bixby, employed him to get him a servant, and advanced Bergland \$50 to pay passage-money and expenses from Sweden, which was the price at the time. During the winter, Bergland went to Sweden, and while there, entered into a written contract, as the agent of Bixby, with one Albertina Larson, a translation of which contract is as follows:

"Agreement with Mr. Charles A. Bergland from Boston. When undersigned, by Mr. Bergland, gets free passage and board as emigrant from Gottenburg to Boston, America, I engage myself to do general housework in the family of W. Bixby, in the city of Nashua, for one year, accounted from the day I begin my services, with wages during said year of seventy-five dollars currency besides the passage-money, and to leave Gottenburgh for Boston, May 3, this year. If there should be any sufficient reasons at the time of my arrival in Boston that should prevent me from serving in said family, or any other family directed to me by Mr. Bergland, with the same wages, I have to pay the bearer of the contract fifty dollars currency as amends for passage and expenses.

"GOTTENBURG, April 29, 1872.

ALBERTINA LARSON,
Pen in the hand."

This contract remained in the possession of said Bergland from the time it was executed up to the time of the trial. On May 20, 1872, a large number of servants arrived in Boston, and among the number was Albertina Larson. The defendant, having been informed by a Mr. Wellman that there were two spare servants who wanted to go to Nashua, went to Boston with Wellman to secure one for his family. One Welhemia Lindberg was pointed out to him by Bergland as one of said spare servants, and said Dunlap selected her. Afterward said Larson being pointed out by Wellman as the other spare servant, he selected her; but before leaving the wharf, Wellman received from Bergland a list of the girls going to Nashua, and the names of their employers, in which list said Larson's name was put down as going to Mr. Bixby; and Wellman testified that Bergland informed him that Larson was brought over for said Bixby, and that he (Wellman) so informed said Dunlap at the wharf. It also appeared that, on their arrival at Nashua, said Dunlap sent the Lindberg girl to Bixby's house, and the Larson girl to Wellman's, and the next morning went to Wellman's with his carriage and carried the Larson girl to his own house. There was evidence tending to show that she supposed she was at Bixby's house for the first three days. She entered Dunlap's service May 21, 1872, and so remained until January, 1873. On May 29, 1872, said Bergland, having been informed that the Larson girl was at the wrong place, visited Nashua to induce her to leave the employ of the defendant and enter into the service of the plaintiff, which she declined to do. It was claimed by the plaintiff that efforts were made by Dunlap to induce her to remain in his employ; but this was denied by the defendant and his family. In July following, said Bergland called upon the defendant for fifty-five dollars, and on July 17, 1872, the defendant paid that sum to Bergland, taking a receipt, of which the following is a copy:

“BOSTON, *July 17th*, 1872.

“Received of Mr. A. H. Dunlap fifty-five dollars for cost of procuring one domestic, Albertina Larson, from Sweden, to be delivered in Boston soon as she can be procured. Sum advanced to be refunded from wages after arrival by the person ordered, or considered part of the wages for the first-year.

(Signed) “CHARLES A. BERGLAND.”

Bixby v. Dunlap.

This receipt is indorsed on the back with the name of Charles A. Bergland, and also the following : "Albertina Larson came to Mr. Dunlap's May 21, 1872." Said Albertina Larson never entered into the employment or service of the said plaintiff, and never performed any labor for him. The agreement, dated Gottenburg, April 29, 1872, was introduced in evidence, subject to the defendant's exception, and the jury were instructed that it was a valid contract between Albertina Larson and Bergland, and the question whether Bergland acted as the agent of the plaintiff in making it was left to the jury. The defendant requested the court to instruct the jury as follows :

1. That upon the evidence and upon the contract the relation of master and servant never subsisted between Albertina Larson and the plaintiff.

2. That the contract made by her and Bergland was not valid and binding ; that there was no mutuality, and under it the plaintiff cannot maintain this action. (The court declined to give the foregoing instructions.)

3. That, in order to be liable for enticing her away, there must have been an active and wrongful effort to detach her from the plaintiff's service [by offering inducements to that end]. (The court gave this instruction, except the part included in brackets, but declined to give that.)

4. That under the contract she had the right upon her arrival here to go where and engage with whom she pleased ; that if she refused for any reason, valid or not, to go where Bergland directed, she had the right to do so ; and the only damages that could be recovered of her would be the amount of the passage-money. That having been paid to Bergland, the plaintiff cannot recover. (The court declined to give this instruction.)

5. That the measure of damages in this case is the value of the services lost up to the time of the commencement of the action, viz.: from May 21 to May 31 inclusive ; the reasonable and necessary expenses incurred in trying to get her back, or in getting one to supply her place ; and damages for the loss of time, trouble, and injury sustained until the commencement of this suit, May 31, 1872. (The court gave the foregoing instruction, with the addition of the following words inclosed in brackets, to the giving of which the defendant excepted.) [And for vexation and distress of mind caused by the unlawful act of the defendant.]

Bixby v. Dunlap.

6. That the plaintiff is not entitled in this action to exemplary damages. (The court declined to give this instruction.)

The court allowed Bergland to testify that Bixby employed him as his agent to hire Albertina Larson, and that he so acted, to which the defendant excepted. The defendant offered to inquire of Miss Larson as follows: "Did you understand, at the time you made the contract with Mr. Bergland, that when you got to America you had the right to go where you pleased, provided your passage-money was refunded to Bergland?" The court refused to allow the question to be answered, to which the defendant excepted.

The jury were also instructed, that if they found that Bergland acted as the agent of Bixby in making the contract with Miss Larson, they should then inquire whether he acted as Bixby's agent in rescinding the contract; that if he did so act, or if Bixby afterward ratified what Bergland did without authority, then the taking of the fifty-five dollars from Dunlap, and the giving of the receipt dated July 17, 1872, would amount to a rescission, or a giving up of the rights of the plaintiff growing out of the contract. (To these instructions no exception was taken.)

On the question of exemplary damages, the jury were instructed that if they found that Dunlap acted in bad faith, that is, that he was conscious that he was doing what he ought not to have done, conscious that he was interfering unjustifiably with the rights of the plaintiff, and tried to conceal the fact that Albertina Larson had been assigned to the plaintiff, they might find exemplary damages by way of punishment, such damages as the plaintiff ought to receive and the defendant ought to pay. They were also instructed to return a special verdict stating the amount of the actual damages and exemplary damages separately. The jury having returned a verdict for the plaintiff for actual and exemplary damages, the defendant moved that the same be set aside.

The questions arising on the foregoing case were transferred to the Superior Court by RAND, J.

Barrett and Wadleigh & Wallace, for plaintiff.

Briggs & Huse and Morrison & Hiland, for defendant.

CUSHING, C. J. In the case of *Lumley v. Gye*, 2 El. & Bl. 216, the law on this subject is stated by CROMPTON, J., as follows:

Bixby v. Dunlap.

“It must now be considered clear law, that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master’s service, or by harboring him and keeping him as a servant after he has quitted it, and during the time stipulated for as the period of service whereby the master is injured, commits a wrongful act, for which he is responsible at law, * * * and I think that the relation of master and servant subsists sufficiently for the purpose of such action during the time for which there is in existence a binding contract of hiring and service between the parties; and I think it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference.” In this view of the law, Judges ERLE and WIGHTMAN, of the court of Queen’s Bench, concurred, while Mr. Justice COLERIDGE, in his dissenting opinion, did not deny this to be law in regard to such persons as would be considered servants within the “statute of laborers.” His objection to the action in the case of *Lumley v. Gye* was, that the party whose contract for service was the subject of the action — Miss Wagner, a public singer and dramatic *artiste* — was not a servant within the statute of laborers; so that I understand that decision must be considered as unanimous, so far as the action for seducing away a menial servant, as in the present case, is concerned.

The cases of *Campbell v. Cooper*, 34 N. H. 49; *Jeter v. Blocker*, 43 Ga. 331; *Hart v. Aldridge*, Cowp. 54, and *Blake v. Lanyon*, C. D. & E. 222, may be referred to as substantially supporting the same doctrine.

According to Para. on Cont., B. 1, § 6, it would have been proper, in an action between Bixby and Larson, to show by oral testimony that Bixby was the principal, and, therefore, entitled to bring the action on the contract in his own name. If there were any doubt about the law in such a case, there could be no doubt in this case that it would be proper to show that Bixby was the owner of the beneficial interest in the contract, that he had paid the consideration, and that the contract was between Larson and himself.

The written contract, having been made in Sweden by parties there at that time, and contemplating at least a part performance

there, I should suppose would be governed by the law of Sweden in regard to its binding effect and the form of its execution; and I think, if the defendant wished to rely upon any positive legislation like the statute of frauds, that he would have to show that such was the law of Sweden; and, in the absence of such proof, I think we may assume that a plain stipulation in which the party bound herself, that, in consideration of a free passage found her from Gottenburg to Boston, she would work a year for seventy-five dollars, would be held to be a sufficient contract.

If held to be governed by our law, it seems clear that it was a sufficient contract in writing for a valid consideration, expressed in the writing and proved to have been paid. As the consideration of Larson's contract was the payment by the plaintiff of the passage-money, and not a promise to employ her, the objection of want of mutuality seems not well founded.

If the law has been so far correctly stated, the first, second, and fourth objections seem to be sufficiently disposed of. I do not see any reason why the instructions given, as in the third request of the defendant, were not well enough without adding the words, "by offering inducements to that end." I do not see how those words can add any thing to the other instructions. I do not see how there could be any enticing to leave the plaintiff's service, without suggesting something by way of inducement.

This, I believe, disposes of every thing, excepting the question about exemplary damages.

That question involves the consideration of the much-discussed law in regard to what are called vindictive, exemplary, or punitive damages. These terms are used sometimes separately, and sometimes all together, not always, perhaps not often, with much scientific accuracy, but yet always with a pretty well-understood and consistent sense of the object to be attained.

Ordinarily, in actions for torts, the rule of damages is compensation in money for the damage sustained by reason of the natural and obvious consequences of the wrongful act. I believe the doctrine of remote and proximate causes has finally reduced itself to this. The wrongful act is the proximate cause of all the damage which ought reasonably and naturally to be expected from it. Always, however, the damage must be something which has a money value, and which can be estimated in money. No doubt, if my neighbor negligently drives his wagon against my ornamental fence,

Bixby v. Dunlap.

he will damage me to the extent of the money value of the necessary repairs ; and if the damage is of such a description that it cannot be made good by repairs, there may be a further sum capable of being estimated in money. It is probable, also, that the injury will be attended with great vexation and distress of mind, perhaps not so great as, and perhaps greater than, another might suffer. It is obviously impossible to put any money value upon this worry and vexation of mind. If a party, by want of ordinary care, damages his neighbor's fence, it cannot be that ordinarily the compensation is to be determined by the peculiarities of temper or disposition of the injured party. Mr. Webster, in his great speech in answer to Mr. Hayne, speaking of some occasions of unpleasantness, said he had "used philosophy." It cannot be that the compensation in money which is to be made for a damage of this kind can be made to depend on the capacity of the plaintiff to mitigate his vexation of mind by the use of philosophy.

So, also, in regard to the expenses of litigation. It very often, perhaps in a majority of cases, happens that the injured party, after receiving his estimated damages and his taxable costs, finds himself seriously out of pocket, yet the necessary and unavoidable expenses of litigation rarely enter as an element into what is spoken of in the cases as actual damage. I am not undertaking now to suggest any new ideas, but simply to state as well as I can, from my recollection of the cases, what the law is. I think I cannot be mistaken in the suggestion that this damage, which is spoken of in the many cases as actual damage, always means damage upon which a money value can be put, and which can in that sense be compensated in money.

When, however, the element of malice enters into the wrong, the rule of damages is different and more liberal. I think it is equally well settled that in such cases there enter into the question of damages considerations which cannot be made the subject of exact pecuniary compensation, such as were described in the charge of the court as mental distress and vexation, what in common language might be spoken of as offenses to the feelings, insult, degradation, offenses against honest pride, and all matters which cannot arise except in those wrongs which are attended with malice.

The action which we are now considering is one in which damages are sought to be recovered for interfering with the relations existing between master and servant. It is familiar to the profession

what a wide range this form of action has been made to take, how many cases there are where the damages in money by reason of the loss of service, which is the gist of the action, are trivial and hardly more than nominal, and yet may be swollen by aggravating circumstances to an enormous amount.

The case of *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202 ; S. S., 2 Am. Rep. 39, is an illustration of an application of the same principle to a different class of cases. In that case the defendant's servant, a brakeman, while in discharge of his duty, assaulted the plaintiff with circumstances of great aggravation and insult, although there was no actual battery, and there was no evidence of any pecuniary loss sustained by the plaintiff. Among other circumstances of aggravation, it was in evidence that the corporation, having notice of the conduct of the brakeman, had continued to retain him in their employment. The court instructed the jury that if the evidence was found to be true, it was a proper case for punitive or exemplary damages. The jury rendered a verdict for \$4,850, which was sustained by the court. The defendant corporation was held answerable for the malicious act of its servant done in the way of his ordinary employment, and the verdict was sustained ; not because of any actual pecuniary loss which could be estimated and compensated in money, but on account of the circumstances of aggravation attending the wrong.

In the endeavor to bring such considerations within the grasp of the law, and, as far as possible, to compensate such wrongs by damages, courts have used the terms "punitive," "vindictive," "exemplary." I do not think that the cases show, in so far as I have examined them, that this has ever been considered as punishing an offense against the criminal law of the State, but simply as a mode of stating the matter so as to bring this almost intangible subject within the grasp of the law. Whenever the law is so held that the jury are instructed that they may leave the domains of actual pecuniary value and go into speculations in regard to compensation for the wounded feelings, the offended pride, the outraged sense of decency and delicacy, they have come into the domain of what the law has been accustomed to call punitive, vindictive, or exemplary damages. It is of little consequence under what name it goes. The substance of the thing must be retained, unless a very large class of cases are to be stricken from the list of actionable wrongs.

Bixby v. Dunlap.

In the case of *Hawes v. Knowles*, 114 Mass. 518 ; S. C., 19 Am. Rep. 383, the head-note is as follows :

“ If there is wantonness or mischief, causing additional bodily or mental damage in the injurious act of a servant within the scope of his employment, the wantonness or mischief will enhance the damages as against the master.”

GRAY, C. J., says : “ In an action in tort for a willful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages.” “ The evidence introduced at the trial, so far as it is reported in the bill of exceptions, was that the defendant’s servant, driving the defendant’s coach, drove against the wagon of the plaintiff wantonly, as well as carelessly and negligently.” “ As applied to this evidence, the instruction given, fairly construed, was only that if, in the act done by the servant in the performance of the master’s business by which the plaintiff was injured, there was wantonness or mischief on the part of the wrong-doer which caused additional injury to the plaintiff, in body or mind, it would tend to enhance the damages, Thus construed, the instruction was unexceptionable.”

According to these views it is incorrect to separate what is called actual damage from what is called exemplary damage. The rule is not, as I understand it, to instruct the jury in the first place to determine the actual money damage which the plaintiff has sustained, and then further instruct the jury that if they find the defendant has been malicious they may give another separate sum in damages by way of example, or for the sake of punishment. The true rule, as I understand it, is to instruct the jury that, if they find the defendant has been malicious, the rule of damages will be more liberal ; that, instead of awarding damages only for those matters which are capable of exact pecuniary valuation, they may take into consideration all the circumstances of aggravation, the insults, offended feelings, degradation, and so on, and endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay. The case of *Fay v. Parker*, 53 N. H. 342 ; S. C., 16 Am. Rep. 270, recently decided in this State, affords a good illustration of my views. There the jury were instructed, without saying any thing about the defendant’s motives, that they might give as compensation damages for all those matters which are usually spoken of as actual damage, and for all

those matters which are usually spoken of as exemplary damages. Then they were told that if they thought proper they might go further and punish the defendant.

So, in the case at bar, the jury were told that they might award compensation for what were termed actual damages, including vexation and distress of mind ; and further, if they thought proper they might add another sum, not by way of compensation, but for something else.

If the jury had not been instructed to give compensation and punishment in separate sums, but had been told that if they found the defendant malicious they might adopt a more liberal rule of damages, and give by way of compensation and indemnity all which in their judgment, under all the circumstances, the plaintiff ought to receive and the defendant ought to pay ; and the court had gone on and explained to the jury that this class of damages, although clearly not to be appreciated in any money value, still might be taken into consideration and so satisfy the plaintiff's feelings ; and that damages of this class were sometimes called vindictive, because they had a tendency to satisfy the just indignation of the plaintiff and the jury, and sometimes called exemplary, because they would have the effect of calling public attention to the wrong and the remedy, and punitory, because, although intended by law to operate as compensation, they would have the effect of and be felt as punishment by the defendant, it is quite likely the verdict, though larger than what was given under the first part of the actual charge, would have been sustained by the court.

It was unavoidable, in the case of *Fay v. Parker*, that the punitive part of the verdict should be set aside ; but it would seem that in fact the whole verdict should have been set aside, because the plaintiff had a right to the benefit of the more liberal rule of damages if the defendant was malicious. And precisely so in this case, I think, the verdict should be set aside, unless the plaintiff is content to remit all that part of the verdict which came under the head of exemplary damages.

I have thus endeavored to bring into some consistent form and statement what seems to me to be the result of the cases and discussions which are to be found in the books.

In the case of *State v. Burnham*, PARKER, C. J., in the course of his learned and able discussion, uses the following language : " It would be an idle and vain attempt to endeavor to reconcile all

Bixby v. Dunlap.

the discussions in the books upon the subject of libel and slander. Many of the cases which have been cited to some of the points in this opinion contain other principles not in accordance with it, and which of course we cannot be understood as adopting. But the distinctions now attempted to be sustained will perhaps in some degree reconcile the decisions themselves." I have somewhat the same feeling in regard to the numerous cases on the subject of what are called vindictive damages. I am aware that there are many cases the language of which is not in harmony with the language I have used; but it appears to me that it is more a question of language than of law. While those cases speak of inflicting punishment, I think they really confine the jury to those considerations which, perhaps, all lawyers admit enter into the question of damages by way of compensation for malicious injuries. I think the spirit of those cases is entirely in harmony with the views I have suggested as being the result of all the cases on the subject; and, while what I have said is a criticism, I hope not unjust, of the language of some of the cases, I certainly do not consider this opinion as overruling their real spirit and intent.

The cases on this subject are legion. Many, perhaps most of them, are referred to in the case of *Fay v. Parker*. Indeed, it is scarcely possible now to open a volume of reports, or a digest of new cases, without finding abundant evidence that this doctrine of a more liberal rule of damages in actions for malicious injuries still maintains its hold wherever the doctrines of the common law prevail.

It appears somewhere in the briefs that the compensation under the first branch of the charge was fixed at \$150, and the exemplary or punitive damages fixed at \$500. As the plaintiff has a right to a more liberal charge on the subject of damages, he will be entitled to have the whole verdict set aside, if any part of it is. We shall not, therefore, set aside a part merely. If the plaintiff thinks proper to remit the \$500, he may have judgment for the other part of the verdict; otherwise, the verdict must be set aside.

Judgment accordingly.

LADD and SMITH, JJ., concurred.

NOTE.—As to right of action for enticing away servant, see *Haskins v. Royster*, 70 N. C. 601; S. C., 16 Am. Rep. 780; *Wood's Master and Servant*, 450, where the question is considered at length.

Bixby v. Dunlap.

Walker v. Cronin, *supra*, was decided on a demurrer to a declaration, alleging that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant, well knowing this, did unlawfully and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter into it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services, and profits and advantages which he would have derived therefrom, and was put to great expense to procure other suitable workmen, and compelled to pay larger prices for work than he would have had to pay but for the said doings of the defendant, and otherwise injured in his business. The court held that the declaration was sufficient. On this point WELLS, J., said:

"The declaration sets forth sufficiently (1) intentional and willful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting.

"The general principle is announced in Com. Dig., Action on the Case, A.: 'In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages.' The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. This proposition seems to be fully sustained by the references in the case of *Carew v. Rutherford*, 106 Mass. 1, 10, 11; S. C., 8 Am. Rep. 287.

"In the case of *Keeble v. Hickeringill*, as contained in a note to *Carrington v. Taylor*, 11 East, 571, 574, both actions being for damages by reason of frightening wild fowl from the plaintiff's decoy, Chief Justice HOLT alludes to actions maintained for scandalous words which are actionable only by reason of being injurious to a man in his profession or trade, and adds: 'How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit in his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege, the other is in respect of his property.' After considering injuries to a man's franchise or privilege, he proceeds: 'The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases.' From the several reports of this case it is not clear whether the action was maintained on the ground that the wild ducks were frightened out of the plaintiff's decoy, as would appear from 3 Salk. 9, and Holt, 14, 17, 18; or upon the broader one, that they were driven away and prevented from resorting there, as the case is stated in 11 Mod. 74, 180. But the doctrine thus enunciated by Lord HOLT covers both aspects of the case; as does his illustration of frightening boys from going to school, whereby loss was occasioned to the master. Of like import is the case of *Tarleton v. McGawley*, Peake, 205, in which Lord KENYON held that an action would lie for frightening the natives upon the coast of Africa, and thus preventing them from coming to the plaintiff's vessel to trade, whereby he lost the profits of such trade.

"There are, indeed, many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defend-

Bixby v. Dunlap.

ants were themselves acting in the lawful exercise of some distinct right, which furnished the defense of a justifiable cause for their acts, except so far as they were in violation of a superior right in another.

"Thus, every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business.

"One may dig upon his own land for water, or any other purpose, although he thereby cuts off the supply of water from his neighbor's well. *Greenleaf v. Francis*, 18 Pick. 117. It is intimated in this case, that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him, without violating any legal right; that is, the motive in such cases is immaterial. *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261; *Delhi v. Youmans*, 50 Barb. 316. A similar decision was made in *Wheatley v. Baugh*, 25 Penn. St. 528; but the suggestion in *Greenleaf v. Francis* was approved so far as this, namely, that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable; and the case of *Parker v. Boston & Maine Railroad*, 8 Cush. 107, was referred to as showing that such loss of advantages previously enjoyed, although not of vested legal right, might be a ground of damages recoverable against one who caused the loss without superior right or justifiable cause.

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.

"It is a well-settled principle, that words, not actionable in themselves as defamatory, will nevertheless subject the party to an action for any special damages that may occur to another thereby. Bac. Abr., Slander, C. The same is true of words spoken in relation to property, or the title thereto, whereby the party is defeated of a sale, or suffers damage in any way. Bac. Abr., Action on the Case, 1; Com. Dig., Action on the Case, C. So also, if, by a wrongful claim of title or lien, the owner is prevented from perfecting a sale, or a purchaser from obtaining delivery to himself of goods, an action will lie. *Green v. Button*, 2 Cr., M. & R. 707.

"In all these cases, the damage for which the recovery is had is not the loss of the value of actual contracts by reason of their non-fulfillment, but the loss of

Bixby v. Dunlap.

advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy. Indeed, it has been held that the loss by the breach of contract, or the wrongful conduct of another than the defendant, would not be recoverable as damages under a *per quod*. *Vickers v. Wilcocks*, 8 East, 1; *Morris v. Langdale*, 2 B. & P. 284; Bac. Abr., Slander, C.

"This doctrine has been doubted, especially in *Lumley v. Gye*, 2 El. & Bl. 216, 289, where the case of *Newman v. Zachary*, Aleyn, 8, is cited to the contrary. That was an action on the case, maintained for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized; the reason for the decision being, 'because the defendant, by his false practice, hath created a trouble, disgrace and damage to the plaintiff.' But the distinction is unimportant in a case like the present, where the damage to the plaintiffs is alleged to have been the direct result of the wrongful conduct of the defendant, and so intended by him; except that it is significant of the point that the existence and defeat of rights by contract are not essential to the maintenance of an action for malicious wrong, when the defendant has no pretext of justifiable cause.

"The case of *Green v. Button*, 2 Cr., M. & R. 767, is especially in point in this connection. The defendant, by means of a false claim of a lien, and of words discrediting the plaintiff, induced one who had sold goods to the plaintiff to refuse to deliver them, whereby he was injured in his business. The court, alluding to the doubts that had been expressed as to *Vicars v. Wilcocks* and *Morris v. Langdale*, and without deciding that question, distinguished the case under consideration, on the ground that, the goods not having been paid for, there was no absolute contract to deliver, upon which the plaintiff could have his remedy against the seller; that is, as the delivery was prevented by the wrongful conduct of the defendant, and there was no binding contract broken by the seller, therefore the plaintiff was entitled to recover in his action on the case *per quod*.

"In *Gunter v. Astor*, 4 J. B. Moore, 12, an action was maintained for enticing away workmen from their employment for a piano manufacturer. They were not hired for a limited time, but worked by the piece. The discussion indicates that damages were considered to be recoverable for the breaking up or disturbance of the business of the plaintiff, whereby he suffered the loss of his usual profits for a long period. The grounds of damage were apparently regarded as altogether independent of the mere loss of any contracts with the workmen.

"In *Benton v. Pratt*, 2 Wend. 885, it is held that proof of loss by the plaintiff of what he would otherwise have obtained, though there was no contract for it which he could enforce, will sustain an action for the wrongful conduct by which the loss was occasioned.

"The difficulty in such cases is to make certain, by proof, that there has been in fact such loss as entitles the party to reparation; but that difficulty is not encountered in the present stage of this case, where all the facts alleged are admitted by the demurrer. This demurrer also admits the absence of any justifiable cause whatever. The decision is made upon the case thus presented, and does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right of free expression of opinion. We have no occasion now to consider what would constitute justifiable cause." —Rm

SIMPSON V. CITY SAVINGS BANK.

(56 N. H. 466.)

Constitutional law — impairing obligation of contract — retrospective law.

A State statute provided that whenever any savings bank should be found to be insolvent, the account of each depositor should be reduced so as to divide the losses equitably amongst the depositors. *Held*, that the act was not unconstitutional, either as impairing the obligation of contracts, or as being contrary to the bankrupt law, or as being retrospective in its operations.

A legislature may vary the nature and extent of the remedy for enforcing contracts so always that some substantial remedy be in fact left.

A law which retroacts upon a past transaction but affects the remedy only and does not affect it injuriously, oppressively, or unjustly, is not a retrospective law within the meaning of a constitutional prohibition.

ACTION to recover the sum of \$3,000, moneys deposited in the defendant savings bank by plaintiff. Plea, confession as to the sum of \$650, and as to the residue that the deposit account of each depositor has been reduced agreeably to the statute cited below in the opinion of the court, and that the plaintiff's said deposit account amounted before the reduction to \$982 and no more, and that by the said reduction it was reduced to \$655. Plaintiff demurred to the plea.

A. W. Sawyer, for plaintiff.

C. H. Burns, for defendants.

RAND, J., C. C. This case raises the question whether or not the tenth and eleventh sections of the act passed at the June session of the legislature, 1874, entitled "An act for the further protection of savings banks and savings bank depositors," are constitutional. The sections in question are as follows: Section 10, chapter 71. "Whenever the assets of any savings bank shall be reduced in value below the total amount of deposits, any judge of the Supreme or Superior Court, in connection with the bank commissioners, shall, on the written petition of a majority of the trustees or directors, reduce the deposit account of each depositor so as to divide such loss equitably amongst the depositors; provided, however, if the bank shall afterward realize from the assets a

greater amount than that fixed upon by the judge and bank commissioners, the amount so realized shall be equitably divided and credited to the account of the depositors which had been thus reduced, but to the extent only of such reduction." Sec. 11.

"Whenever it appears to the bank commissioners that the assets of any savings bank are reduced below ninety per cent of the deposits, it shall be the duty of said commissioners, in connection with a judge of the Supreme or Superior Court, of their own motion, to proceed as provided in section ten."

It is important, in the first place, to see how the law stood before the act of 1874 was passed.

According to ch. 152 of the Gen. Stats., if it is judged by the bank commissioners to be necessary for the public safety that any bank should not continue to transact business, they shall represent the facts by petition to some justice of the Supreme Court. Such justice shall issue an injunction prohibiting, so far as may be thought necessary, the transaction of any business by said bank, and the commissioners shall cause the same to be duly served. Such injunction may be modified by said justice; and the court, upon petition and notice to the bank commissioners, may dissolve, modify, continue, or extend the same, as equity may require. The bank commissioners may apply to the court, or a justice thereof, to appoint an assignee of the property and effects of such bank, and such appointment may be made by the court.

Such assignee shall take possession of all the estate, property, rights, and credits of the bank, and may do any act necessary to convert such assets into money. Upon application the court may issue an injunction restraining all proceedings at law by any creditor against such bank, and may order notice to be published requiring all creditors to present and prove their claims against such bank, and in default to be precluded from all benefit of the assets, of such bank.

The proceeds of the property shall be holden (1) to pay the expenses of the assignment, (2) to pay all bills issued by the bank *pro rata*, (3) to pay in equal proportions all debts, claims, and obligations owing by such bank, (4) the remainder to be divided among the stockholders according to their interests.

The plaintiff contends that the act of 1874 is void, because (1) it impairs the obligations of contracts, and is in conflict with art. 1, sec. 10, of the United States Constitution, (2) because it is retro-

Simpson v. City Savings Bank.

spective in its operation, and is, therefore, repugnant to the 23d article of the New Hampshire bill of rights, (3) because there was a general United States bankrupt law in force when the law of 1874 was passed.

It is a very well-settled doctrine that courts will not declare laws unconstitutional unless they are clearly so. 1 Cow. 550; 19 Johns. 58; 2 Penn. St. 184; 12 Wheat. 270; 6 Cranch, 87; 2 Pet. 522; 3 Dall. 399; 4 id. 14; 1 Cranch, 137; 1 N. H. 114; 39 id. 304; 16 Pick. 95.

I. Does the law of 1874 impair the obligation of the contract which the plaintiff made with the bank, and is it, therefore, repugnant to the Constitution of the United States? What was the contract?

The second section of the act of 1863, incorporating the bank, provides that "said corporation shall be located in the city of Nashua; shall be capable of receiving, from any person or persons disposed to enjoy the advantages of said savings bank, any deposit or deposits of money, and to use, manage, and improve the same for the benefit and best advantage of the person or persons by and for whom the same shall be deposited respectively; and the net income and profits of all deposits of money received by said corporation shall be paid out and distributed in just proportions among the several persons by and for whom the said deposits have been made." When this provision of the bank's charter is compared with the law as laid down in the General Statutes, it seems to me to be too clear for argument, that, by the contract made with the bank, the plaintiff was to receive his just proportion of the profits of the bank, and bear his just proportion of the losses. The pleadings admit that the assets of the bank are not sufficient to pay the depositors in full. The contract in this case is what the law, as it existed at the time the contract was made, implies from the acts of the parties, and its obligation consists in its binding force upon the parties. How can it be said that the law implies that other depositors, standing in precisely the same relations to the bank as the plaintiff, must bear more than their share of the losses? The Law of 1874 provides a new way of getting at the just share of such depositor in the losses of the bank. It would seem to be less cumbersome than the old law. It is purely a law affecting the remedy; and it is not easy to see how the depositors of the bank are injured by it. There is a great weight of authority to

Simpson v. City Savings Bank.

the point that a legislature may "vary the nature and extent of the remedy, so always that some substantial remedy be in fact left." *Morse v. Goold*, 1 Kern. 281; *Stocking v. Hunt*, 3 Denio, 274; *Van Rensselaer v. Snyder*, 3 Kern. 299; *Ogden v. Saunders*, 12 Wheat. 213; *Mason v. Haile*, 12 Wheat. 370; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Tarpley v. Homer*, 17 Miss. 310; *Quackenbush v. Danks*, 1 Denio, 128; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Rockwell v. Hubbell's Adm'rs*, 2 Doug. (Mich.) 197; *Sprecker v. Wakeley*, 11 Wis. 432; *Smith v. Packard*, 12 id. 371; *Holloway v. Sherman*, 12 Iowa 282; *Penrose v. Erie Canal Co.*, 56 Penn. St. 46; *Sturges v. Crowninshield*, 4 Wheat. 122; *James v. Stull*, 9 Barb. 482; *Bruce v. Schuyler*, 4 Gilm. 221, 227; *Howard v. Kentucky & Louisville M. Ins. Co.*, 13 B. Monr. 285; *Bigelow v. Pritchard*, 21 Pick. 169; *Evans v. Montgomery*, 4 Watts & S. 218; *Bronson v. Kinzie*, 1 How. 311.

It will be noticed that section ten of the act of 1874 does not relieve the bank from the claim of the depositor upon payment of his reduced account.

II. Are the tenth and eleventh sections of the act of 1874 repugnant to the twenty-third article of the New Hampshire bill of rights?

That article is as follows: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."

The last case in our reports, which interprets this article of the Constitution, is *Kent v. Gray*, 53 N. H. 576. The doctrine of that case is, that "retrospective laws are unconstitutional and void, because they are injurious, oppressive, and unjust." It is also said, in the opinion delivered, that "any generalization founded on the distinction between right and remedy is attended with some danger, because of the difficulty of drawing that distinction so accurately as not to impair the force of the constitutional prohibition. Undoubtedly, a remedy may be changed in some sense, and to some extent, without affecting a right, that is, there may be a change in the remedy that is not injurious, oppressive, and unjust; but it is equally clear that a remedy may be so changed as to affect a right injuriously, oppressively, and unjustly, within the meaning of the prohibition. A statute is not necessarily just and valid because it affects the remedy. The question is not whether it affects the

Simpson v. City Savings Bank.

remedy, but whether it affects the remedy in a certain sense, and the remedy only." There was no dissenting opinion in *Kent v. Gray*, and the doctrine of that case must be regarded as the deliberate opinion of all the judges who then constituted the court. A law is not, then, necessarily within the prohibition of the twenty-third article of the bill of rights, because it looks back upon past transactions; it is not necessarily outside of the prohibition, because it affects the remedy; but if it affects the remedy only, and the court cannot see that it affects it injuriously, oppressively, or unjustly, the law should be regarded as constitutional and valid.

Rich v. Flanders, 39 N. H. 304, was a very carefully considered case. In that case the court was divided in opinion. Two very able dissenting opinions were delivered by BELL, C. J., and BELLOWS, J. But Judge BELLOWS says, at the close of his opinion, that he did not consider the question of the power to change the remedies for existing causes of action when no suit had been brought, because his views were prepared for a suit which was pending at the passage of the law. And BELL, C. J., says: "The distinction relied on in *Willard v. Harvey*, between a retrospective law affecting the remedy alone, and one which affects the decision of the cause, still appears to us to be sound; it is supported by the language of the Constitution, and by the numerous decisions referred to." The views of the majority of the court were given by SARGENT, J., p. 319: "A retrospective law literally means, a law which looks backward, or upon things that are past; or, if it be taken to be the same as retroactive, it means, to act on things that are past. If it were to be understood in its literal meaning, without regard to the legal intent, then all laws having an effect upon past transactions, or laws by which the slightest modification should be made of the remedy for the recovery of rights accrued or the redress of wrongs done, are prohibited equally with those which divest rights, or impair the obligation of contracts. But we have seen that it has not received any such literal interpretation in this State, but that it has uniformly been held that statutes affecting the remedy, though in fact retroactive, are not considered retrospective in the legal sense of that word."

In *Kennett's Petition*, 24 N. H. 139, it was held that the act of 1850, relating to road commissioners, was void as to that petition, which was pending before the passage of the act, because it affected the *decision of an existing cause of action*.

In *Willard v. Harvey*, 24 N. H. 344, the doctrine in regard to retrospective legislation is stated as follows: "The broadest construction of legislative rules, which forbid retrospective legislation, would require that all statutes, affecting in any way a civil cause, must be so entirely prospective, that no new rule could be applied in the decision of a cause which did not exist when the right of action accrued. But a construction so broad as this could not be reasonably held, since the effect would be that no change could be made in the courts or course of justice which would affect the actions or causes of action then existing.

"The courts, therefore, have everywhere recognized a distinction between statutes affecting rights, and those affecting remedies only."

Pickering v. Pickering, 19 N. H. 389, is a case where the objectionable law was passed after the commencement of the suit. The court there say: "Upon the commencement of this suit, certain rules of pleading obtained; and it must be held that certain rights thereunder then arose as well to the defendant as to the plaintiff; as to them, it then became necessary for the parties to conform their respective cases."

In *Dickinson v. Lovell* 36 N. H. 364, it was held that the act of 1855 did not take away the right of review in actions pending when the statute went into effect. The discussion in the case related mainly to section 26 of chap. 1 of the Revised Statutes. The court say: "Suppose the legislature to have had the constitutional power to take away this right; did they intend that the act should have that effect?"

"In cases where the legislature have unquestionable power under the Constitution to take away or substantially modify the remedy in a pending suit, it is generally impolitic and unjust to exercise the power."

It seems to be conceded here by Judge PERLEY, who delivered the opinion, that there are cases in which the legislature have the power to take away or substantially modify the remedy.

Colony v. Dublin, 32 N. H. 432, is a case similar to *Dickinson v. Lovell*, and the opinion was delivered by the same judge. The discussion turned not so much upon the twenty-third article of the bill of rights, as upon the 26th section of chap. 1 of the Revised Statutes. Judge PERLEY says: "We are not inclined to deny that the legislature have power to change the mode of proceeding

Simpson v. City Savings Bank.

on a pending petition for a highway by a general law applicable to the subject, though the change might be such as in a particular instance would defeat the object of the petition." And again: "In cases where it would be within the acknowledged scope of legislative power to change the law so as to defeat a legal proceeding already commenced, it would in most instances be unjust to exercise the power." It was decided that the general rule of construction in the Revised Statutes must be applied to the act of 1855, which provided that no highway should thereafter be laid out except on the unanimous report of the road commissioners, and, therefore, that the act must not be allowed to affect a pending proceeding.

Dunbarton v. Franklin, 19 N. H. 257, raises no question as to the power of the legislature to pass remedial statutes which retroact upon past transactions. It decides that section 11 of chapter 149 of the Revised Statutes, which declares under what circumstances persons cohabiting together shall be deemed to have been legally married, must not be permitted to operate retrospectively.

Roby v. West, 4 N. H. 285, was trover for lottery tickets. In June, 1807, an act was passed for the suppression of lotteries. In July, 1827, this act was repealed. It was held that the repealing act having been passed since the commencement of the action, to construe it to take away any ground of defense would give it the operation of a retrospective law for the decision of a civil cause.

In *Dow v. Norris* it is held, that, where a statute gives a penalty incurred under it to an individual, the right of the individual cannot be taken away by a repeal of the statute. In this case it is also held: "That a law operating retrospectively upon an existing cause of action, when no suit is pending, is as much to be deemed a retrospective law for the decision of a cause, and as much within the prohibition of this clause in the Constitution, as a law establishing a new rule of decision for an existing action." It will be noticed that the language is, "operating retrospectively upon an *existing cause of action*." I think there can be no doubt about the soundness of the general doctrine here laid down; and it seems to me to be equally clear, from the authorities in this State, that, where the law is one affecting the remedy alone, the question whether or not a suit has been instituted may touch the very pith and marrow of the controversy; for upon the answer to that may depend the

answer to the further question, whether or not the law operates injuriously, oppressively, and unjustly. The bringing of a suit may introduce into the controversy questions in regard to vested rights, which would not otherwise arise.

In *Clark v. Clark*, 10 N. H. 380, it is held that a statute which attempts to confer authority upon the court to grant a divorce for matters already past, and which, at the time they occurred, furnished no ground for a dissolution of the marriage, is a retrospective law for the decision of a civil cause.

But, in the opinion, PARKER, C. J., says : "Of course it is not intended to deny the right of the legislature to vary the mode of enforcing a remedy, or to provide for the more effectual security of existing rights. * * * All retrospective laws are not within the prohibition, notwithstanding the general terms of the first part of the article. * * * That a retrospective law operates oppressively and unjustly, however, tends to show that it is within the condemnation of the Constitution." And he quotes from *Woart v. Winnick*, 3 N. H. 481. In that case it was held that an act of the legislature, repealing a statute of limitations, is, with respect to all actions pending at the time of the repeal, and which are barred by the statute, a retrospective law repugnant to the Constitution. And the doctrine is stated generally in the following terms : "That it (the clause in the Constitution) was intended to prohibit the making of any law prescribing new rules for the decision of existing causes, so as to change the ground of the action, or the nature of the defense."

In *Society v. Wheeler*, 2 Gall. 105, Judge STORY holds the act of 1805 unconstitutional, if applied to a possession existing and improvements made prior to its passage. The act provided that when there had been peaceable possession and actual improvement of land, by virtue of a supposed legal title under a *bona fide* purchase, for more than six years before suit brought for the recovery of the land, the tenant should be entitled to the value of his improvements. The decision was, that the statute could apply only to cases where there had been possession for six years after the passage of the statute ; and Judge STORY says : "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective." This lan-

Simpson v. City Savings Bank.

guage must, of course, be understood with reference to the facts in the mind of the court. Giving it the broadest possible interpretation, it might, perhaps, include a law affecting the remedy alone, and not operating injuriously, oppressively, or unjustly. But I think it should not be so interpreted.

In *Merrill v. Sherburne*, 1 N. H. 199, it is held that an act of the legislature, awarding a new trial in an action which has been decided in a court of law, is an exercise of judicial power, and in its operation retrospective. There can be no doubt about the soundness of that decision, but its bearing upon the case before the court is somewhat remote.

The foregoing are the New Hampshire cases relied on by the plaintiff. A review of them seems to lead to this question: Do the 10th and 11th sections of the act of 1874 operate injuriously, oppressively, or unjustly upon the plaintiff? The law was passed before his suit was instituted, but after his deposits were made. He complains that his attachment is defeated as to one-third of his claim; but, under the law as it stood when the deposits were made, his whole suit might be defeated, and his entire claim remain unpaid until a receiver appointed by the court should pay him a dividend, if a dividend should be declared. Under the new law, he gets two-thirds of his claim without delay, and holds unimpaired the right to claim his *pro rata* share of the balance, if the bank realize from the assets a greater amount than that fixed upon by the judge and commissioners. If there is any injury, oppression, or injustice here, I am not able to see it.

In the plaintiff's brief, it is suggested that "This law of 1874 touches the 'heart blood' of this plaintiff, because, if there had been an injunction, the defendants would have been obliged to settle the plaintiff's cost as well as his debt." It would seem to be clear enough that, if the plaintiff had accepted the amount confessed, he would have taken judgment for his costs up to the time of the confession. But now, if he suffer in the matter of costs, his tribulation will be caused not so much by the Law of 1874, as by his own persistent disregard of the law.

III. Is the Law of 1874 inoperative, because when enacted there was a United States bankrupt law in force?

"Whenever a corporation, created by the laws of any State, whose business is carried on wholly within the State creating the same and also any insurance company so created, whether all its busi-

ness shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State, for the purpose of winding up the affairs of such corporation or company, and dividing its assets ratably among its creditors, and lawfully among those entitled thereto, prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made or that shall be made by such court, agreeably to the State law, for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company, shall be deemed valid, notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company." Rev. Stats., U. S., tit. 61, ch. 6, § 5123, p. 995.

There is no doubt that the general rule is well settled, that as soon as Congress has exercised its power of making a general bankrupt law, and it has gone into operation, the State insolvent laws are suspended. *Chamberlain v. Perkins*, 51 N. H. 340, and cases there cited. But "where the bankrupt act expressly excepts a class of cases, it must have been the intention of Congress not to interfere in such specified class with the laws of the several States." Bump on Bankruptcy, 243.

I think the condition of the defendant bank is such as to place it among the class of cases excepted out of the operation of the bankrupt law. The demurrer must, therefore, be overruled.

CUSHING, C. J. The question in this case arises upon a demurrer to the plea. The plea confesses the plaintiff's action to the amount of \$655.22, and pleads in bar to the residue of the plaintiff's claim that proceedings had been had under the law of June, 1874, entitled "An act for the further protection of savings banks and savings bank depositors;" and that on April 9, A. D. 1875, the bank commissioners, in conjunction with a justice of the Superior Court, had examined into the affairs of the bank, and found that one-third of its deposits had been lost, and that the plaintiff's just proportion of the remaining two-thirds amounted to the above-mentioned sum of \$655.22, and no more. The plea amounts, I think, to a sufficient allegation that the whole present value of the plaintiff's share of the deposits in the bank amounts to that sum, and no more.

Simpson v. City Savings Bank.

This brings us directly to the question whether a depositor in a savings bank is entitled, by getting ahead in what used to be called the race of diligence, to pay himself his whole demand out of the funds of the bank at the expense of his co-depositors. The question has only to be asked to be answered in the negative.

In the case of *Coite v. Soc. of Savings*, 32 Conn. 173, the court say that savings societies “are in fact large incorporated agencies for receiving and loaning money on account of their owners. They have no stock and no capital. * * * They are merely places of deposit, where money can be left to remain, or be taken out, at the pleasure of the owner.”

In the case of *Bunnell v. The Collinsville Savings Soc.*, 38 Conn. 203, it appeared that the bank, having met with losses, and the directors having ascertained that the bank had suffered losses amounting to a sum equal to twenty-four per cent of the deposits, voted that “the twenty-four per cent of his balance, on January, 1868, be charged to each depositor to cover the loss sustained by the bank, it being understood that a dividend is to be declared in the same way to the depositors when all accounts are settled.” The vote of the directors was substantially like the statute of New Hampshire, reducing the deposit accounts to the present value of the funds of the bank, and providing for a further dividend in case there should eventually be any thing more realized.

The action was brought after the plaintiff had received his seventy-six per cent, for the purpose of recovering the remaining twenty-four per cent. It was held that he could not recover. PARK, J., *arguendo*, says: “Had this institution wound up its affairs in consequence of this loss, the plaintiff would not have received any portion of the sum he now seeks to recover. * * * He knew, when he deposited his money, that he was placing it at hazard. He put it into the hands of the defendant to be used by it substantially as his agent for his benefit, and in the use so much of it as has been lost. What ground has he to complain?”

“The assets this institution now has belong substantially to the present depositors. How can he obtain his loss? Shall he be paid out of their money? They have an equal right to be paid out of his. Substantially, he has lost the sum he now seeks to recover by his own act, through the instrumentality of his agent, and he has no cause to complain.”

In the present case, it stands admitted on the pleadings that the defendants have confessed the plaintiff's action for the whole amount of his share of the present value of the assets of the bank. There can be no hardship in holding him to this, because, by the provisions of the statute, if any thing more should be realized out of the assets of the bank, he is to have his share.

This view of the case entirely avoids all question as to the constitutionality of the statute under consideration, because there never was any contract on the part of this bank to pay any more than the plaintiff's share of what should be found to be the actual value of the deposits.

The charter of the bank, as well as the general law of New Hampshire, provides that the legislature may at any time amend, alter, or repeal the charter, but always so as not to affect any existing rights or liabilities. The charter of this bank must be taken, therefore, to be now amended by the provisions of the act.

It should be remembered that this case comes up on a demurrer to a plea by which, as I think, it is substantially admitted that the plaintiff's share of the assets of the bank amounts to no more than the sum confessed, so that the question is distinctly raised whether the plaintiff can recover more than his share of the assets of the bank.

From the charter of the bank, taken in connection with the general law (Gen. Stats., ch. 152, and Comp. Stats., ch. 148) I infer that the depositors are entitled to their shares of the profits and bound to bear their shares of the losses according to the amount of their deposits, and each depositor is entitled to his share of the assets of the bank. I do not think there is any contract, express or implied, on the part of the bank, to pay any more.

With this view of the matter, I confess I do not see any room for the intervention of a bankrupt law at all, if there are no claims against the bank excepting those of the depositors. How can it be said, in any just sense, that the bank, under such circumstances, is owing debts which it cannot pay? Nor can I see of what use a certificate of discharge would be. The depositors are entitled to the aid of the statute, and, in the absence of statute provision, to the aid of chancery, to effect a fair distribution of the assets.

If there were any thing conclusive as to the final result in the action under the statute of 1874, I should be extremely doubtful of its constitutionality, in so far as it attempted to provide for a per-

Simpson v. City Savings Bank.

manent adjudication without notice to all the parties who are entitled to be heard.

The statute, however, does not, as I understand it, propose any final result, or deprive the depositors of the right to a full hearing before the proper tribunal for the purpose of determining the exact value of each depositor's share. There is nothing in the act under consideration, which I can see, which purports to interfere with or prevent the statutory provisions for winding up such banks whenever the bank commissioners think it expedient. The statute furnishes a very convenient mode by which the bank can be put in condition to go on if the depositors acquiesce ; but it does not, that I can see, prevent the plaintiff, or any other depositor, from applying to the commissioners. and putting in motion the statutory provisions for winding up the bank and dividing the deposits.

Neither does it, in any way that I can see, interfere with the operation of the bankrupt law, if the bank should be so situated as to come within its provisions, *i. e.*, if it should be found to be owing debts which it could not pay, to which the bankrupt law could apply. I do not now see how the claims of the depositors to their shares of the capital stock or deposits can be considered such a debt ; but that need not be determined here.

LADD, J. I am of the same opinion. The object of the statute of 1874 clearly was, to provide a simple and inexpensive mode by which the rights of the depositors *inter sese*, as they exist at common law under the charter of the bank, as well as the rights and obligations of the bank, may be protected and enforced. I cannot see that it does any thing more than a court of equity would be bound to do, upon proper application, without any statute, namely, secure a *pro rata* division, among its equitable owners, of a common fund, which has been placed in the hands of a common agent, to be used by such agent for the common purpose of making gain and profit for the principals. It seems to me that this view, which has been fully presented by the chief justice as well as by my brother RAND, disposes of the whole case, and that we need go no further.

Demurrer overruled.

WARDE V. MANCHESTER.

(56 N. H. 508.)

Tax — exemption from — school of religious sects.

A statutory exemption from taxation of school-houses and seminaries of learning extends to such as are founded by a particular religious sect for instructions according to its doctrines.

PETITION for abatement of taxes. The case was referred to a commissioner to report the facts, who subsequently made report as follows:

“I find the following to be the material facts involved in said cause; that is to say, I find and report, that, in the assessment of the public taxes by the city authorities of Manchester for the year 1873, a tax of sixty-two dollars and fifty cents was assessed upon a lot of land, on the corner of Beach and Laurel streets, in said city, known as lot 1306, and a tax of fifty dollars upon the lot adjoining, known as lot 1307, it being stated in the record-book of assessments that the owners of said lots were unknown, and the ownership of said lots being, in fact, unknown to the assessors at the time of the assessment; that said lot 1306 was purchased in 1870 by the Rev. Wm. McDonald, then and ever since pastor of St. Anne’s church in said Manchester, and a conveyance taken to the petitioner by the name of Maria Theresa F. X. Warde, and the purchase-money for said conveyance paid from funds belonging to a religious order or association connected with said church, of which the petitioner was and has ever since been the recognized lady superior or head; that neither said church nor religious order or association is organized as a corporation under the laws of this State, or of the United States, but according to the forms and methods of the Catholic church, for the purpose of religious worship, and of maintaining religious institutions, agreeably to the faith and practice of that church; that said lot 1307 was purchased in 1869, and paid for in like manner, and a conveyance thereof taken to said Warde by the name of Frances T. Ward; that, prior to said purchase in 1869, an academy or seminary for the instruction and education of females had been established, and was and has ever since been maintained upon a lot adjoining said lots 1306 and 1307, under the particular supervision of the peti-

Warde v. Manchester.

tioner as the 'Mother Superior' of said order or association designated the 'Sisters of Mercy,' the funds for the support of said establishment being derived mainly from the tuition fees and charges for the board of pupils educated at said institution; that the educational course in said academy comprises all the branches of instruction, useful and ornamental, usually included in the academic course of the higher seminaries for the finished education of young ladies; that, in addition thereto, the pupils are carefully instructed in moral and religious principles, as understood by the adherents of the Catholic faith; that said two lots were purchased for the purpose of using the same, in connection with said educational institution, as an enlargement of the establishment, for the accommodation of a greater number and of a different class of pupils, the said lot 1306 and the buildings thereon being used exclusively as an academy for day scholars, not boarders, at the establishment, and the other lot, 1307, and the buildings thereon, being used for dormitories for the pupils and teachers and others, boarders or having their homes at the institution, and necessary and convenient outbuildings, — and ever since they were purchased they have been so used; that due application was made to the assessors of said city to abate said taxes, which was refused, and that said petitioner is not precluded from maintaining said petition by reason of any neglect to comply with the law."

The Circuit Court — CUSHING, C. J., of the Superior Court, presiding — ordered, *pro forma*, that the tax be abated according to the prayer of the petition.

To this order the defendants excepted, and the questions thus raised were transferred to this court.

Sulloway & Topliff, for the petitioner.

Briggs & Huse and *J. P. Bartlett*, for the city of Manchester.

FOSTER, C. J., C. C. This property is devoted exclusively to the purposes of a seminary of learning, the educational course of which comprises all the branches of instruction, both useful and ornamental, usually included in the academic course of the higher seminaries for the finished instruction of young ladies. In addition to this, the pupils, we are told, are carefully instructed in moral and religious principles, as understood by the adherents of the Roman Catholic church.

Notwithstanding by the policy of our fathers, as expressed in their bill of rights, Art. 6, the Protestant religion is regarded with peculiar favor, still every denomination of Christians, demeaning themselves quietly and as good subjects of the State, is declared to be equally under the protection of the law.

Protection and taxation are reciprocal. Our Constitution prescribes the duty of legislators and magistrates, "in all future periods of this government, to cherish the interests of literature and the sciences, and all seminaries and public schools; to encourage private and public institutions for the promotion of * * * arts, sciences, etc., * * * to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry, economy, sincerity, sobriety, and all social affections." Const., art. 83.

In the performance of this prescribed duty, the legislature has seen fit to provide for the exemption from taxation, without distinction of sect, denomination, or party, all houses of public worship, school-houses, and seminaries of learning. Gen. Stats., ch. 49, § 2.

We live in an age three hundred years later than the eve of St. Bartholomew and the fires of Smithfield. The fruits of the age, grown from the rough but kindly soil where our fathers planted good seed, are charity and toleration. They hoped their children might possess, enjoy, and practice these virtues, precious in their estimation, because to them their grace and beauty had been denied; and, because we have regarded the precepts of our fathers, the laws of this generation encompass, encourage, and protect all classes alike.

So long as people behave themselves in a peaceable and orderly manner, the doors to intellectual culture, enjoyment, and progress stand wide open. It is none of our business, in such a case, whether the lady superior of the sisters of mercy upholds the dogmas of the Romish church, or inculcates the doctrine of universal salvation after the most liberal sort of Protestantism. It would be a reproach to us if it were otherwise, and, happily, under the law it cannot be.

The law requires that these taxes shall be abated.

LADD, J., and RAND, J., C. C., concurred.

Exceptions overruled.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

DETROIT v. BECKMAN.

(84 Mich 125.)

Municipal corporation — when not liable for errors in plan of improvements.

Municipal corporations are not liable for injuries resulting from the *plan* of a public work, as distinguished from its mode of execution, unless such plan must necessarily result in a direct invasion of private property.

Plaintiff's intestate, in driving through defendant's streets, ran off the end of a culvert and was killed. In an action for damages on the ground that defendant was negligent in building a culvert so short as to render the street dangerous, *held*, that the defendant was not liable, as the defect was in the plan of the culvert. (*See note, p. 510.*)

ACTION for damages. The opinion states the case.

D. C. Holbrook, for plaintiff in error.

Otto Kirchner, for defendant in error.

COOLEY, C. J. This action was brought by the defendant in error to recover for the negligent killing of her intestate. The death appears to have been caused by the intestate running the wagon which he was driving through one of the city streets off the end of a culvert and overturning into a ditch. The accident took

place late in the evening, and the complaint is, that the city was negligent in causing so short a culvert to be constructed, and leaving so much of the ditch open and unprotected. The ditch and culvert were not of recent construction, and it was not alleged that there was any negligence whatever in the construction except that which pertained to the plan itself.

In the brief for the defendant in error it is stated that "no question is made as to the liability of the city of Detroit for the injury set out in the declaration. The only questions arise upon the charges and refusals to charge as to what constitute negligence," etc. We do not find this distinctly admitted on the part of the city, and if it were, the admission of a rule of law could not obligate the court to accept and act upon it. And in this case it is very plain that there is no right of action whatever.

When complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault found is with legislative action, and a suit grounded upon it is grounded on a wrong attributable to the legislative body itself. For the determination to construct a public work, and the prescribing of the plan, are and must be matters of legislation, whether done on behalf of the State by or under the direction of its legislative body, or on behalf of a county, town or city by or under the direction of the proper board or council. In the carrying out of the plan there may be negligence attributable to ministerial officers, but negligence in the plan itself must be attributed to the body that devised, ordered or adopted it.

There are cases in which a municipality has been held liable for the construction of a public work which necessarily and inevitably caused injury to individuals. The case of *Perry v. Worcester*, 6 Gray, 544, may be placed in this category. There in repairing a bridge over a river the space for the passage of the water was so narrowed that in times of freshet the water was set back upon proprietors above, to the serious injury of their property. *Child v. Boston*, 4 Allen, 41, was a case where a city was held liable for flooding the plaintiff's premises by neglecting to keep a sewer open and unobstructed, and it can have no bearing on the present controversy. *Lacour v. New York*, 3 Duer, 406, was an action on the case for an injury occasioned by an excavation in one of the streets of New York. On a careless reading it might seem to afford some countenance to the present action,

Detroit v. Beckman.

but it is manifest from the opinion that negligence in the performance of the work was the basis of the recovery. There are many cases similar to these, in some of which the judgment has been based upon the negligent action of ministerial agents, while others have given a remedy for what was, in effect, a direct invasion of private property.

The distinction in principle between the case where the complaint is, that the work must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the owner is entitled, and a case where the fault found is with the plan, as not being most wise and prudent to protect against accidents, seems very distinct and palpable. The public authorities cannot appropriate a man's property without making him compensation, whether it be done by excluding him from his land or by flooding or otherwise injuring it; but to what extent they shall guard the citizen against dangers when he is making use of a highway or other public convenience is and must be a matter of discretion. The wisdom and propriety of local legislative action cannot be made a judicial question; it is and must be a political question, and can arise only between the legislator and his local constituency.

The leading English case upon this subject, of *Governor, etc., v. Meredith*, 4 T. R. 794, has been often recognized in this country, and the principle applied in a variety of cases. It was applied in *Wilson v. New York*, 1 Denio, 595, where the complaint against the city was of neglect to construct proper drains and sewers to carry off surface water. This case was followed in *Mills v. Brooklyn*, 32 N. Y. 489, in a careful opinion by DENIO, J., who refers to several decisions in New York which give it support. A like decision was made in *Carr v. Northern Liberties*, 35 Penn. St. 324-329, where the following remarks are made by LOWRIE, C. J.: "Municipal corporations have often been held liable for carelessness in the exercise of their functions; but if we undertake to correct the evil in such a case as this, on the ground of carelessness, we do not see how to escape from the necessity of submitting the propriety of all acts of grading and draining in our towns to the decision of juries; for even discretionary acts may be charged to have been ignorantly or carelessly resolved upon. Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow; or as being pitched in a wrong direction;

and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted." In support of the same views reference may also be made to *Child v. Boston*, *supra*; *Roberts v. Chicago*, 26 Ill. 249; *Snyder v. Rockport*, 6 Ind. 237; *Lamber v. St. Louis*, 15 Mo. 610; *Cotes v. Davenport*, 9 Iowa, 227; *White v. Yazoo*, 27 Miss. 357; and many others, all of which follow the early case of *Callender v. Marsh*, 1 Pick. 418; in which it was decided that no recovery could be had for incidental injury to property occasioned by the grading of a street; no question of negligence in the performance of the work being involved.

In this State the question which lies at the foundation of this suit is not an open one. In *Larkin v. Saginaw County*, 11 Mich. 88, it was decided that no action would lie for an injury resulting from an exercise of legislative authority. In *Pontiac v. Carter*, 32 Mich. 164, which was a case of injury by change in the grade of a street to buildings previously erected with reference to an established grade, the point was quite fully discussed, and the liability of the city denied. These cases are decisive of the present. And see *Dermont v. Detroit*, 4 Mich. 435-443.

Several of the rulings in the court below conflict with these views, but as it is necessary to pass only upon the main questions, we do not consider it important to refer to the rulings specially. The judgment must be reversed, with costs of both courts. As no recovery can be had under the declaration, a new trial is not ordered.

The other justices concurred.

NOTE.—See *Rowe v. Portsmouth*, *ante*, p. 464; *Van Pelt v. Davenport*, (43 Iowa, 308), 20 Am. Rep. 622, and the note thereto; *Imler v. Springfield* (55 Mo. 119), 17 Am. Rep. 645; *Dixon v. Baker* (65 Ill. 518), 16 id. 591; *Oliver v. Worcester* (102 Mass. 489), 8 id. 485; *Simmons v. Camden* (28 Ark. 276), 7 id. 620; *Dorman v. Jacksonville* (18 Fla. 538), 7 id. 253 and note; *Cincinnati v. Penny* (21 Ohio St. 499), 8 id. 73; *Thurston v. St. Joseph* (51 Mo. 510), 11 id. 468. The foregoing case was followed by the same court in *City of Lansing v. Toolan*, 16 Alb. Law. Jour. 164, in which the opinion was as follows:

COOLEY, C. J. Toolan brought suit against the city of Lansing to recover damages for an injury received by him from falling into a ditch which, he

Detroit v. Beckman.

alleges, was cut by authority of the city across one of its streets, and negligently left uncovered and unguarded. The facts appear to be that one Van Keuren was employed by the city to build a wing to one of the bridges over Grand river, and that in the prosecution of that work he found it necessary to cut the ditch in question across a street near it to keep the water, after a heavy rainfall, from rushing against and destroying his unfinished wall. This he did on his own responsibility, covering it with plank to the width of sixteen feet. While it remained in this condition, Toolan, in turning off the street in passing along one evening, fell in the ditch and was injured. There were questions of his negligence on the trial below which are immaterial here. The city afterward paid Van Keuren for his work, and allowed the ditch to remain for a sewer. The case was put to the jury as one of negligence, and the plaintiff recovered.

It is claimed, in support of the judgment, that the city has accepted and ratified the act of Van Keuren in cutting the ditch and partially covering it, and is therefore liable on the principles laid down in *Detroit v. Corey*, 9 Mich. 165. It was on this ground that the plaintiff recovered below.

When the case was tried in the Circuit Court, the case of *Detroit v. Beckman*, 34 Mich. 125, was not reported. If it had been, the circuit judge would probably have instructed the jury differently. It was there decided that the city could not be held liable to one who had fallen into an open sewer and received an injury thereby, where the only ground of complaint was, that the city had not covered the sewer where it crossed a street to the extent which due and proper care required. If the city, in this case, had instructed Van Keuren to make and cover the ditch or sewer as he did, the facts would have resembled very closely those in the Beckman case, and the two could not have been distinguished in principle. The point of the decision was, that a lawful exercise of legislative action cannot be a wrong; and as the determination of the plan of a public work is in the nature of legislative action, there must be something besides the proper execution of the plan — some negligence in its execution, or some other distinct wrong — before the municipality constructing the work could be held responsible for a tort.

Now, had Van Keuren been employed by the city to cut the ditch for a sewer and cover it for the passage of teams as he did, putting it precisely in the condition in which it was when Toolan was injured, the city, under the decision in Beckman's case, could not have been held liable as for negligence in not providing for covering it further. In planning a public work a municipal corporation must determine for itself to what extent it will guard against possible accidents. Courts and juries are not to say it shall be punished in damages for not giving to the public more complete protection; for, as was shown in Beckman's case, that would be to take the administration of municipal affairs out of the hands to which it has been intrusted by law. What the public have the right to require of them is, that in the construction of their works after the plans are fixed upon, and in their management afterward, due care shall be observed; but negligence is not to be predicated of the plan itself.

This disposes of the present case. If we assume the original responsibility of the city for Van Keuren's act, then the only fault in the case was in not providing further covering for the ditch or sewer. But that goes to the plan only; it has nothing to do with the execution of the plan, which, indeed, is not complained of.

The judgment must be reversed with costs, and a new trial ordered.

DETROIT v. MARTIN.

(34 Mich. 170.)

Tax — when cannot be recovered back — unconstitutional law.

A tax was assessed on land under a statute afterward decided to be unconstitutional. Prior to such decision the owner paid the tax, under protest, to prevent a threatened sale. *Held*, that the payment was voluntary and that the money could not be recovered back.

A sale of land for taxes laid under an unconstitutional law does not constitute a cloud upon the title; and, therefore, payment of such taxes to prevent a sale is voluntary, though made under protest, and cannot be recovered back. (See note, p. 519.)

ASSUMPSIT to recover money. The following facts were stated by the court.

Plaintiff below, defendant in error, was the owner of a certain lot in the city of Detroit upon which there was assessed ninety-six dollars and fifty-four cents on account of the opening of Labrosse street in said city. After the assessment was made he received a written notice signed by the city attorney notifying him of the fact and requesting him to pay the amount thereof within sixty days from the date of service of the notice, and that in case of failure at the expiration of that time the property so assessed would be advertised and sold by the receiver of taxes of said city to pay said assessment. After the expiration of the sixty days, and on the 3d of March, 1874, he paid said assessment, to prevent the threatened sale, under protest, and had the protest entered upon the books of the treasurer. Plaintiff remonstrated against the opening of said street, and prior to the commencement of suit in this case petitioned the common council of said city to repay him the amount with interest, which was refused. The provision of the city charter under which said assessment was levied and collected was by this court, at the June term thereof, 1875, declared unconstitutional, in the case of *Paul v. The City of Detroit*, 32 Mich. 108.

Plaintiff brought assumpsit to recover back the amount so paid, and the above facts were found by the jury in a special verdict, upon which judgment was rendered for the plaintiff. The city brought error, alleging that the payment was a voluntary one; that plaintiff was not entitled to recover, and that the facts found did not sustain the judgment.

 Detroit v. Martin.

D. C. Holbrook, for plaintiff in error, cited *Fleetwood v. City of N. Y.*, 2 Sandf. 475; *Forrest v. Mayor of N. Y.*, 13 Abbott, 352; *N. Y. & H. R. R. Co. v. Marsh*, 12 N. Y. 308; *Lott v. Swezey*, 29 Barb. 87; 11 N. Y. 99; *Cooley on Taxation*, 565-570.

Brennan & Donnelly and *G. V. N. Lathrop*, for defendant in error, cited *Nicodemus v. East Saginaw*, 25 Mich. 456; *First Nat. Bank, etc., v. Watkins*, 21 id. 483; *Dill. Mun. Corp.* 855 and notes; *Jenks v. Lima*, 17 Ind. 326; *Preston v. Boston*, 12 Pick. 7; *Cook v. Boston*, 9 Allen, 393; 13 Gray, 476; *Baker v. Cincinnati*, 11 Ohio St. 534; *Taylor v. Board of Health*, 31 Penn. 73; *Green v. School Dist.*, 57 Penn. St. 433; *Cooley on Taxation*, 565-570; *Atwell v. Zeluff*, 26 Mich. 118; *McKee v. Campbell*, 27 id. 497; *Loud v. Charleston*, 99 Mass. 208; *Arnold v. Cambridge*, 106 id. 352; *Hunnewell v. Charlestown*, id. 350; *Hays v. Hogan*, 5 Cal. 241; *Falkner v. Hunt*, 16 id. 167; *Guy v. Washburn*, 23 id. 111; *Dill. Mun. Corp.* 841 and note.

MARSTON, J. As the case has been presented in this court upon the question whether the payment was voluntarily made or not, it would be well for us to understand clearly, not only the circumstances under which the money was paid, but the legal result or effect upon plaintiff's rights in case he had not paid this money, as by so doing we will be better enabled to determine the question submitted.

Plaintiff was the owner of the lot assessed. The amount assessed thereon was illegal and void, the statute under which such assessment was made having been unconstitutional. The city, through its proper officers, threatened to sell the lot if the assessment was not paid. To prevent this threatened sale, the money was paid under protest. Such are the facts in brief.

If not paid and the property sold, what would have been the legal effect of such sale?

If plaintiff had not paid, we may assume the threat would have been carried out and the property sold. How would such sale have affected the plaintiff's right or title thereto? Would such sale have constituted a cloud upon his title? Assuming that it would, in order to prevent this, he could have paid the amount under protest, and afterward have maintained an action to recover it back. If a sale under the facts stated would not have constituted a cloud upon his title, then it may be, at least, doubtful whether the plaintiff

has any remedy, as it is not pretended there was any fraud, duress or seizure of his goods, either actual or threatened, or that the officers of the city had any authority to seize them. "A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality, if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title, and, therefore, in law could constitute no cloud." Cooley on Taxation, 542.

Under the facts found in this case, and the law applicable thereto, the sale and conveyance thereunder would not have constituted a cloud upon plaintiff's title, even although by the charter assessments may be declared a lien upon the land, and the conveyance *prima facie* evidence of the regularity of the proceeding, because from an inspection of the conveyance, which would recite the proceedings, and of the record, it would at once appear that the assessment was wholly unwarranted by law and totally void.

The plaintiff, at the time he paid this tax, paid it with the full knowledge of all the facts and circumstances. He is conclusively presumed to know the law applicable thereto. He is presumed to have known at the time he paid this tax that the statute under which the assessment was made was void, and that a sale of the premises therefor would constitute no cloud upon his title, and that he could not be injured by such sale.

Such being the legal conclusion from the facts found, was the payment voluntary or involuntary?

There is no doubt but that where the parties do not stand upon equal terms, as where the person making the demand has the goods of another and refuses to deliver them except upon payment of an illegal exaction, as in *Parker v. The Great Western Railroad Co.*, 7 M. & G. 253; or where the plaintiff was entitled to a license, and the defendant to grant it, but refused to deliver it except upon payment of a sum of money he was not entitled to, as in *Morgan v. Palmer*, 2 B. & C. 729; or where the payment is made to release personal property from seizure, either actual or threatened, where

Detroit v. Martin.

the person making the threat has the then present ability to make good his threat, as in *Atwell v. Zeluff*, 26 Mich. 118; and perhaps where a sale of the real estate assessed would constitute a cloud upon the title, in all such cases, the party pays under compulsion, and may afterward, in an action of assumpsit, recover back the amount of the illegal exaction.

The plaintiff, however, does not bring himself within the principles of any of these cases. He knew all the facts at the time he made the payment; none of his property was held by the party making the demand; no seizure had been made or threatened, nor did it appear that the officer making the demand, or that any officer, had the power to compel in any way payment of the amount, except by a threatened sale of the property assessed, and which if carried out could injure no one, unless it might have been the purchaser. The threat, therefore, was a harmless one. It could not have alarmed the plaintiff, as it could not have affected his rights. If carried out, the sale would have had no force, and the conveyance thereunder no validity. The assessment was a mere nullity, and could not have been enforced in any way, there being no statute authorizing it. Yet the plaintiff, knowing all this, voluntarily went to the treasurer's office and paid the amount claimed. The case "stands on no higher ground than it would if the plaintiff, when the tax was demanded of him by the collector, had said to him: 'I know your tax is illegal and void; I am under no obligation to pay it, but I shall pay it under protest, and with an intention to sue for and recover it.' * * * All the authorities agree that money paid under such circumstances cannot be recovered." *Sheldon v. South School District*, 24 Conn. 88; *Bulkley v. Stewart*, 1 Day (Conn.), 133.

Where taxes had been levied under an unconstitutional statute, demanded and paid for a series of years, and the statute being then held void, suit was brought to recover the amount paid, LOWRIE, J., said: "We state the case as one of a voluntary payment of taxes, because there is no pretense that the defendant's officers did any more than demand the tax under a supposed authority of the law; and there is no more a compulsion than where an individual demands a supposed right. The threat that is supposed to underlie such demands is a harmless one; that, in case of a refusal, the appropriate legal remedies will be resorted to. It is supposed that there was real compulsion, because no certificate would be

granted by the health officer to the ships without the payment of the tax, and without the certificate no entry would be allowed by the custom house officers. If this be the compulsion relied on, it is vain, for it proceeded from the Federal officers, and not from the defendant, who could have nothing to do with it. *Taylor v. Board of Health*, 31 Penn. St. 73.

In *Forrest v. The Mayor, etc.*, 13 Abbott, 351, an assessment was made upon real estate for constructing a sewer. The money was alleged to have been paid on compulsion and under protest. Afterward the assessment upon the real estate was set aside for fraud and illegality. An action was then brought to recover back the money paid. On demurrer the court held, that the compulsion mentioned must be considered to refer to the inconvenience the owner encountered in using the lots by selling or mortgaging them; that no facts were mentioned which showed compulsion; that it was difficult to suppose any actual compulsion could be used in respect to real estate. And the court there held, there being no allegation that the plaintiffs were under any mistake or ignorance of the facts when they paid the money, it must be considered as a voluntary payment on their part, received by the defendant under a claim of right, and that they could not recover it back.

This case has been followed and approved in that State. *Fleetwood v. The City*, 2 Sandf. 475; *Lott v. Swezy*, 29 Barb. 87; *The N. Y. & Harlem R. R. v. Marsh*, 12 N.Y. 308 (in this last case the officer making the demand had no power to then enforce it, owing to the place where the demand was made); *Union Bank v. New York*, 51 Barb. 159; see further as to voluntary payments, Cooley on Taxation, 566, and authorities cited; Broom's Legal Maxims.

If, under the circumstances in this case, the plaintiff could recover, I do not see what there would be to prevent parties from in all cases voluntarily paying their taxes under protest, and if at any time afterward, within the statute of limitations, it was discovered, or decided by a court of competent jurisdiction, that the statute under which they were levied was illegal, then bringing an action and recovering them back again. The consequence of such a doctrine, to say the least, would be very serious.

What effect then does a protest made at the time nave? Under the circumstances of this case it has none. It cannot make a payment otherwise voluntary, involuntary. "A party who has paid voluntarily under a claim of right shall not afterward recover

back the money, although he protested at the time against his liability." SHAW, C. J., in *Preston v. Boston*, 12 Pick. 13 ; *Lee v. Inhabitants, etc.*, 13 Gray, 476.

Where money is illegally demanded, but under a claim of right, and the payment is an involuntary one, the protest is a notice to the person to whom the payment is made that the person paying does not acquiesce in the illegal demand, and thereby surrender up any right he may have to recover back the money. Besides, a payment without protest would prevent the party afterward from recovering interest in an action brought to recover back the amount paid. *Atwell v. Zeluff*, 26 Mich. 120. The effect of a protest beyond this, if any, may not be very clear or well settled.

We have examined the California cases cited and relied upon by counsel for defendant in error. The case of *Guy v. Washburn*, 23 Cal. 111, relies entirely, without any discussion, upon the two previous cases of *Falkner v. Hunt*, 16 Cal. 167, and *Hays v. Hogan*, 5 id. 241. *Falkner v. Hunt* was a case of an assessment upon personal property. In *Hays v. Hogan*, an excessive tax was levied upon real estate. The act under which the municipality was organized provided that if any person failed to pay any tax levied upon real or personal property, the town collector might recover the same in a suit, in the name of the corporation, before any court of competent jurisdiction. No such suit was commenced. The property, real estate, was summarily sold, and the plaintiff became the purchaser. The court said : "The right of the plaintiff to recover, under the circumstances, is undoubted. He protested against the sale, purchased in order to protect his property from a clouded title, and made the payments under protest, and in a few days afterward commenced his suit for the recovery of the money. * * * Even supposing that the plaintiffs were not the owners of the property, then it would follow, that as the sale was wholly unauthorized and void, as purchasers they could take nothing, and, therefore, may recover the money sued for, under the count for money had and received." It will be seen that this case is put upon two grounds : 1. A purchase to protect his property from a clouded title ; and 2. The sale, if void, as purchasers they could take nothing, and might recover back the money paid. The case has no application to the one before us.

In a late California case, not referred to by counsel, where property was assessed for widening a street, to a stranger, and the true

Detroit v. Martin.

said taxes at the rate of fifty per cent per annum. Plaintiff paid the same under a written protest, claiming that the interest should have been only at the rate of twenty-five per cent. The court held that he could not recover the money so paid. VALENTINE, J., delivering the opinion of the court, said: "A correct statement of the rule governing such cases as this would probably be as follows: Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, unless to release his person or property from detention, or to prevent an immediate seizure of the same, such payment must be deemed to be voluntary, and cannot be recovered back; and the fact that the party at the time of making the payment files a written protest, does not make the payment involuntary."

But in a subsequent case the same court, while affirming the foregoing rule, held that taxes paid under protest could be recovered back where the tax had been assessed, the time for its correction passed, and nothing remained to be done but to issue the warrant for its collection, which the statute required to be done. *Kansas Pacific R. R. Co. v. Commissioners of Wyandotte Co.*, 16 Kans. 587.

In Massachusetts, in *Boston Glass Co. v. Boston*, 4 Metc. 181, it is held that "payment of taxes to a collector, who has a tax-bill and warrant in the form prescribed by law, is to be regarded as compulsory payment, and if such taxes were assessed without authority, they may be recovered back in an action for money had and received, although the party made no protest before payment." This case follows *Preston v. Boston*, 12 Pick. 7, where it is held, "if a person pay an illegal tax in order to prevent the issuing of a warrant of distress with which he is threatened, and which must issue of course unless the tax is paid, the payment is to be deemed compulsory, and not voluntary."

In *Grim v. School District*, 57 Penn. St. 434, it is said to be settled law, that "A party who, when threatened with a distress, pays an illegal tax under protest and notice of suit, may maintain an action to recover it back." See, also, *Henry v. Horstick*, 9 Watts, 412. In *Allen v. Burlington*, 45 Vt. 202, the court says: "If the plaintiff was constrained to pay the tax to save his property from distress, and to avoid a penalty and costs, it was not a voluntary payment. *Babcock v. Granville*, 44 Vt. 826; *Henry v. Chester*, 15 id. 460.

In *Fellows v. School District*, 39 Me. 559, a party was arrested for non-payment of a tax, promised to pay if released, was released and about a week after paid the tax and costs; this payment was held not to be voluntary; so in *Gachet v. McCall*, 50 Ala. 307, the owner of land which was advertised for sale for non-payment of taxes, promised the tax-collector that, if he would postpone the sale, he would pay the tax. The sale was postponed and the tax paid according to agreement, but under protest. Held, that the payment was voluntary and could not be recovered.

In *Meek v. McClure*, 49 Cal. 623, which was an action against a tax-collector to recover back money paid under protest for taxes alleged to have been not duly assessed—in this that the assessment made by the assessor had been irregularly and unlawfully increased by the board of equalization—the court held that the money could not be recovered because the protest was not sufficient to indicate to the defendant the grounds upon which the plaintiff claimed the demand to be illegal. RHODES, J., delivering the opinion of the court, said: "It was held in *Huyes v. Hogan*, 5 Cal. 243; *McMillan v. Richards*, 9 id. 417; *Fullner v. Hunt*, 16 id. 167, and other cases in this court, that if money which is not legally due is exacted by means of duress or coercion, it may, if

Detroit v. Martin.

paid under protest, be recovered back. The purpose and effect of the protest is not satisfactorily defined in any of those cases. In one of them it is said that one purpose of the protest is to take from the payment its voluntary character; but it is manifest that it is involuntary only because of the coercion, the duress, or the undue advantage exercised or possessed by the party to whom the payment is made. If money is paid, under these circumstances, to a party for his own use, no protest is necessary in order to lay the foundation of an action. In most of the cases in which the effect of a protest is considered, the payment was made to a public officer; and the only purpose of the protest was to give the officer notice that the money was not legally due, and thus to enable the officer to protect himself against the consequences of an action to recover the money back from him. The officer is thereby put on inquiry as to whether the money is legally due; and if he finds that the demand is illegal, he may protect himself by refusing to receive the money; or, if he finds that it is of doubtful legality, he may take the proper steps to avoid, or protect himself against responsibility. If the officer has notice of the matter which renders the demand illegal, another notice in the form of a protest would be useless; but if he has no knowledge of such matter, he ought not to be subjected to the costs and consequences of an action to recover the money from him—and that too, perhaps, after he has paid over the money in the usual course of official business—without notice from the party paying the money of the grounds upon which he claims that the demand is not legally due. Wherever a protest is essential, it is, therefore, necessary to state the grounds upon which the party paying the money claims that the demand is illegal. The statement of the precise amount which is claimed to be illegal, when a part of the demand is legal, is of but little moment, for that, as in this case, can readily be ascertained by the official to whom the money is paid, upon being informed of the ground upon which payment would be refused, except for the coercion or duress. In this case the defendant was not informed by the protest that the plaintiff claimed that the action of the board of equalization was void; and there was nothing in the assessment roll or other document which came to the hands of the defendant, as the tax-collector, which would impart notice to him that the action of the board of equalization in increasing the valuation of the plaintiff's property was void, because the order was made without any complaint having been filed before the board, stating that the valuation was too low. The protest, in our opinion, was not sufficient to entitle the plaintiff to maintain an action to recover back the amount paid on account of the increase of the valuation of the property."

In *Hendy v. Soule*, Deady, 400, it was decided that when taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make payment involuntary.

As to when money voluntarily paid may be recovered back, see *Town of Ligonier v. Ackerman*, 15 Am. Rep. 323; S. C., 46 Ind. 552; also note to *Black v. Ward*, 15 Am. Rep. 171; *Chandler v. Sanger*, 19 id. 357; *Spaids v. Barrett* 11 id. 10.—REP.

MACOMBER v. NICHOLS.

(84 Mich. 212.)

Highway — nuisance in — steam engine is not — means of locomotion — negligence.

Plaintiff, while driving along a highway, was injured by reason of his horse taking fright at an engine mounted on wheels which defendant was moving along the same highway by means of steam power. In an action for damages the court charged the jury that "a party placing upon the highway any vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom." *Held*, error.

The users of horses and similar animals upon highways have no rights superior to the users of other means of locomotion; and if the use of the one result in injury to the user of the other, the right of action will depend on the question of negligence, which is to be determined by the jury.

A steam engine as a means of locomotion in a highway is not necessarily a nuisance. (*See note, p. 528.*)

ACTION on the case to recover damages occasioned to the plaintiff through the alleged wrongful act of defendant. The opinion states the case.

T. G. Pray, for plaintiff in error, cited 14 Gray, 242; 35 N. H. 257; 7 Barb. 508; 13 id. 658; Redf. on Railw. 520; 28 Mich. 32; 1 Allen, 190.

May, Buck & Fraser, for defendant in error, cited *Congreve v. Smith*, 18 N. Y. 79; *Conklin v. Thompson*, 29 Barb. 218; *People v. Cunningham*, 1 Den. 524; *Bartlett v. Hooksett*, 48 N. H. 18; *Knight v. Goodyear Co.*, 38 Conn. 438; *Ayer v. Norwich*, 39 id. 376; *Young v. New Haven*, id. 435; *Foshay v. Glen Haven*, 25 Wis. 288; *Morse v. Richmond*, 41 Vt. 435; *Pa. R. R. v. Barnett*, 29 Penn. St. 259; *Lake v. Milliken*, 62 Me. 240; *Darling v. Westmoreland*, 52 N. H. 401; *Mahoney v. R. R. Co.*, 104 Mass. 73; *Thomas v. Telegraph Co.*, 100 id. 157; *Baker v. Portland*, 58 Me. 199.

COOLEY, C. J. This is an action on the case, in which Nichols sought to recover for an injury occasioned by his horse taking fright as he was driving along the public highway near Battle Creek, about 9 o'clock in the evening of September 9, 1874. The

Macomber v Nichols.

fright was caused by an engine mounted on wheels, which the defendant was moving along the same highway by means of the steam power by which it was operated. The engine was used mainly for threshing, and was moved from place to place for that purpose. The traveled part of the highway, at the place of the accident, was about thirty feet in width, and Macomber gave evidence tending to show that he was moving on the extreme right of this traveled way, and that he shut off steam and stopped the engine when the horse was seen approaching. Each party claimed to be free from negligence himself, and charged negligence upon the other. The following instructions, among others, were given to the jury at the request of Nichols:

“1. If you find that about the 9th day of September last, the plaintiff was driving a well-broken and gentle horse in the public street or highway, in Battle Creek, in this county, that the defendant, by running a steam engine along said highway, caused plaintiff's horse to run away, and that plaintiff was thereby injured, either in person or property, and that such steam engine was well calculated to frighten horses of ordinary gentleness, then the plaintiff is entitled to recover.

“2. The right to travel in a public highway is a right which is common to all, and no person has the right to impede or render dangerous the travel of the highway by any other person.

“3. A party placing upon the highway any vehicle unusual and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom.

“4. It is no defense to this suit that the defendant was using the steam engine in the transaction of his lawful and legitimate business, if his use of the highway in such business rendered the highway dangerous for others to travel.

“5. The defendant had no right to run his steam engine on the public street or highway if such engine was calculated to frighten horses of ordinary gentleness.”

Other instructions of similar import were given, but the foregoing are all that need be stated to make clear the view which was taken by the circuit judge of the main point in controversy.

It is hardly probable that when the circuit judge told the jury that no person has a right to impede or render dangerous the travel of the highway by any other person, he intended them to under-

stand this language literally and without qualification. Almost any proper use of a highway may under some circumstances impede the use by another, and possibly render it dangerous. The appearance of any unusual object in the streets may have some tendency to add to the dangers of travel by means of horses or other animals, and there is always more or less danger that a high spirited horse, or indeed any other horse, may become unmanageable, and people who are using the highway be exposed to risks in consequence. But it does not follow that the driver of such a horse is responsible for the consequences because of his bringing him into the street impeding or rendering dangerous the travel by others. The question is one of reasonable use and reasonable care, and if these are observed, he is not chargeable. Probably the circuit judge did not intend to be understood as going beyond the requirement of reasonable care and caution on the part of all persons making use of the public ways; and this instruction, if it stood alone, would not have been likely to mislead.

But the instruction that any one placing upon the highway a vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom, is not only erroneous, but it could not fail to mislead. It was an instruction, in substance, that the placing of such a vehicle in the highway is always, and under all circumstances, an illegal act; a wrong in itself, for which an action will lie on behalf of any one who may chance to be injured in consequence.

Injury alone will never support an action on the case; there must be a concurrence of injury and wrong. If a man does an act that is not unlawful in itself he cannot be held responsible for any resulting injury, unless he does it at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. In such a case the negligence imputable to him constitutes the wrong, and he is accountable to persons injured, not because damage has resulted from his doing the act, but because its being done negligently or without due care has resulted in injury. If the act was not wrongful in itself, the wrong must necessarily be sought for in the time or manner or circumstances under which it was performed, and injury does not prove the wrong, but only makes out the case for redress after the wrong is established.

Macomber v. Nichols.

Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods.

A highway is a public way for the use of the public in general, for passage and traffic, without distinction. *Starr v. C. & A. Railroad Co.*, 4 Zab. 592. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purposes for which highways are established.

It is not long since that the great highways by water were supposed to be of such transcendent importance as to entitle those who made use of them to superior rights over those making use of other highways which might intersect them. Accordingly bridges over navigable waters, when permitted at all, were required to be so constructed as to secure to vessels an uninterrupted passage, and the travel and traffic by land was compelled to await the convenience of travel and traffic by water. But this rule was never inflexible; it was a rule that must yield to circumstances; and it was never a matter of course that the master of a vessel was entitled to a remedy as for a legal injury when the convenience of one making use of a bridge was preferred to his. The case was one in

which rights must be harmonized, and unavoidable inconveniences to one party or the other must be submitted to as something inseparable from any employment of the powers of government to provide or regulate the channels for travel and commerce. There may be, in any case in which a highway by land intersects a highway by water, questions of difficulty as to whether, in view of all the circumstances, the one or the other is of the greater importance, and whether the general public would be better accommodated by compelling those making use of the one to submit to temporary inconvenience for the accommodation of those passing or moving property by the other; or, on the other hand, by recognizing in the former such paramount rights as are not to be narrowed or encroached upon by any rights possessed by the latter. Over unimportant streams a bridge may do far more to accommodate the public than the navigable privilege; and the unreasonableness of a refusal to recognize the fact when legal rights are found to depend upon it, is very manifest. The paramount rights which have been asserted on behalf of vessel owners as against railroad companies have been very distinctly denied, the court holding that they must submit to any incidental inconvenience that may be inseparable from allowing to the public the benefit of improved locomotion by land. *Works v. Junction R. R.*, 5 McLean, 425, 438; *Spooner v. McConnell*, 1 id. 337, 379; *Jolly v. Terre Haute Bridge Co.*, 6 id. 237, 242; *Miss. & Mo. R. R. Co. v. Ward*, 2 Black. 485. It follows that a bridge over a navigable stream is not of necessity a nuisance; it may or may not be such, according to the circumstances; and the vessel owner who brings his suit for an injury occasioned by it must show the circumstances which make the injury fairly chargeable to some one as a wrong.

But the bringing of an unsightly object into the common highway is no more of a wrong because of its tendency to frighten horses of ordinary gentleness, than is the construction of a bridge over a river a wrong, because of its tendency to delay vessels. The one may be a wrong, under some circumstances, and so may the other; but it is equally true that both may be proper and lawful under other circumstances. It would be difficult to pass through the streets of our large towns without encountering objects moving along them which are well calculated to frighten horses of ordinary gentleness until they become accustomed to them; but which nevertheless are used and moved about for proper and lawful

Macomber v. Nichols.

purposes. The steam engine for protection against fire may be mentioned as one of these; and though this is usually owned and moved about by public authority, there can be no doubt of the right of a private individual to keep and use one for his own purposes, and to take it through the streets when necessary. But other things which are sometimes moved about on wheels along the streets are equally alarming to horses when first used. Wild animals collected and moved about the country for exhibition are always more or less likely to frighten domestic animals, but they may nevertheless be lawfully taken on the public highways under proper precautions.

It has justly been remarked by the Supreme Court of Illinois in a case involving the right to make use of steam as a means of locomotion in the public streets, that "a street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used." "To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because the streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age." *Moses v. P., F. W. & C. R. R. Co.*, 21 Ill. 516, 523. In some of the large cities of the country sufficient means of transit by the old methods have become practically out of the question, and steam power is permitted as a matter of necessity, not only as a means of moving vehicles by the side of teams in the street, but also over their heads, where the liability to cause fright would perhaps be still greater. Horses of ordinary gentleness would at first be liable to take fright, but after a time they become accustomed to the objects that at first are so fearful to them, just as in the country they become accustomed to see trains of cars passing near them along the ordinary railways, which sometimes for a considerable distance run in immediate proximity to the common roads. Horses may be, and often are, frightened by locomotives in both town and country, but it would be as reasonable to treat the horse as a public nuisance from his tendency to shy and be frightened by unaccustomed objects, as to regard the locomotive as a public nuisance from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential, but only the paramount authority of the legislature can give to either

Macomber v. Nichols.

the owner of the horse or the owner of the locomotive exclusive privileges. If one in making use of his own means of locomotion is injured by the act or omission of the other, the question is not one of superior privilege, but it is a question whether, under all the circumstances, there is negligence imputable to some one, and if so, who should be accountable for it.

In the Circuit Court instructions were given on the subject of mutual negligence, which are probably unexceptionable; but they seem to have been entirely unimportant, because the other instructions, which treated the use of the engine in the public highway as unlawful, necessarily disposed of the case. We think the instructions last mentioned were erroneous. The engine as a means of locomotion in the highway was not necessarily a nuisance. It might possibly be a nuisance at some time, and under some circumstances, and even where it might be proper to make use of it the manager or owner might be liable to damages for negligence in management to the injury of others. But the question in any such case must be one of fact; a question of reasonable conduct and management on the part of both parties; and should be submitted to the jury as such.

The judgment must be reversed with costs, and a new trial ordered.

The other justices concurred.

Judgment reversed.

NOTE.—In *Watkins v. Redden*, 2 F. & F. 629, the plaintiff brought action for injuries sustained through his horse taking fright at a traction engine used on the highway for the purpose of drawing trucks and carriages. The defendant relied on 24 and 26 Vict., ch. 70, "An act for regulating the use of locomotives on roads," which recited "That the use of locomotives is likely to become common on turnpike and other roads," and defined the width of the tire of the wheels, and the weight of such locomotives, etc., and which also declared that nothing in the act contained "shall authorize any person to use upon a highway a locomotive engine, which shall be so constructed or used as to cause a public corporate nuisance; and every person so using such engine shall, notwithstanding this act, be liable to an indictment or action, as the case may be, for such uses where, but for the passing of the act, such indictment or action could be maintained."

ERLE, C. J., charged the jury thus: "The plaintiff is entitled to your verdict if the engine was calculated by its noise and appearance to frighten horses so as to make the use of the highway dangerous to persons riding ordinary horses. For the defendant has clearly no right to make a profit at the expense of the security of the public. Besides this, however, which is the main question, I desire you to find separately (as there is an issue in the *sciencer*) whether before the accident, the defendant *knew* of the danger, supposing you find it

Heisrodt v. Hackett.

to exist. If he knew it from his men or other persons, it would be sufficient. So if he knew it from the nature of the engine itself." The plaintiff had a verdict.

Statute 5 and 6 Will., ch. 50, § 70, enacted It shall not be lawful to erect a steam engine within twenty-five yards from a carriageway, unless it shall be within some house or other building, or behind some wall or fence sufficient to conceal it, so that it may not be dangerous to passengers, horses or cattle.

In *Smith v. Stokes*, 4 B. & S. 84, and in *Harrison v. Leaper*, 5 Law Times Rep. (N. S.) 640, it was decided that a portable steam engine upon wheels and drawn by horse power, used to drive a threshing machine within a barn, but not affixed thereto or to the soil, was within the above enactment.

In *Ayer v. Norwich*, 12 Am. Rep. 393; S. C., 39 Conn. 376, a tent in a highway likely to frighten horses was held to be a nuisance under a statute requiring towns to keep their highways "in good and sufficient repair," and in the subsequent case of *Young v. New Haven*, 39 Conn. 435, a steam roller used in repairing streets, and left by the wayside over Sunday, frightened plaintiff's horse, and the court held it to be a nuisance. So in *Foshay v. Glen Haven*, 3 Am. Rep. 73; S. C., 25 Wis. 288, objects in the highway naturally calculated to frighten horses were held to be nuisances.

In *Knight v. Goodyear Rubber Co.*, 9 Am. Rep. 403; S. C., 38 Conn. 438, plaintiff's horse was frightened by a steam whistle on defendants' mill near a highway, and the defendant was held liable.

In *Faver v. Boston & Lowell R. R. Co.*, 19 Am. Rep. 364; S. C., 114 Mass. 350, the plaintiff's horse was frightened by defendants' train of cars passing over a bridge above the highway, and the defendant was held not to be liable.—RMP.

HEISRODT V. HACKETT.

(34 Mich. 283.)

Animals—injury to dog—license—statutory construction—"any person."

A statute authorized "any person" to kill a dog going at large and not licensed and collared. In an action to recover for the killing of plaintiff's dog by defendant's dog, *held*, no defense that plaintiff's dog was not licensed and collared, as defendant's dog was not a "person."

ACTION for damages. The opinion states the case.

W. H. Sweet and Albert Trask, for plaintiff in error.

Thompson & Tarsney, for defendant in error.

MARSTON, J. The plaintiff, Heisrodt, brought an action to recover damages for the loss of a small but valuable dog, which had been killed by a large dog owned by or in the possession of the defendant.

The defendant claimed that the plaintiff's dog was not licensed and did not wear a collar, as required by the act of 1873, at the time he was killed.

Upon this branch of the case the court charged the jury as follows:

"1. By the law of 1873, then in force, the owner of dogs was required to have a license running from the 1st of April of each year to the 1st of April of the following year; and also to cause such dog to wear a collar around his neck during the life of the license and no longer; and it is made lawful for any person, and also the duty of certain officers, to kill any and all dogs going at large and not licensed and collared according to the provisions of this act.

"2. If you find as a matter of fact that the plaintiff's dog was not licensed and was not collared within this law, the collar being marked with the name of the owner and number of the license, he could not recover the value of his dog, even if killed by the defendant's dog, provided his dog was running at large. He could not be considered as running at large if he was on his owner's premises. But if you find the plaintiff's dog was at large, outside the plaintiff's premises, plaintiff cannot recover, even if his dog was killed by the defendant's dog."

3. Plaintiff's counsel requested the court to charge the jury "that if they find the dog had been properly licensed and a proper collar had been placed upon his neck, and by accident the collar had been lost off of the dog's neck, and the plaintiff had no opportunity to replace it between the time of its loss and the killing of the dog, that the plaintiff was equally protected by the law as if the dog had the collar on." This was refused.

The requirements of the act of 1873 (Laws of 1873, p. 483) sufficiently appear in the charge of the court as given. The sixth section of that act is as follows:

"Any person may, and it shall be the duty of every police officer and constable of any township or city, to kill any and all dogs going at large and not licensed and collared according to the provisions of this act, and such officers shall be entitled to receive from the township or city treasury fifty cents for each dog so killed by them."

Defendant claimed protection under this section.

People v. Brown.

A statute under which a party is in so summary a manner to be deprived of his property, by having it destroyed, should not be extended by construction. That dogs have a value and are the property of their owner cannot be well denied at the present day, whatever may have been the rule heretofore. And without questioning the power of the State to prescribe such regulations as may be deemed necessary and proper to prevent injury being done by them, yet we cannot say that where the legislature has authorized persons to kill dogs found running at large contrary to the act, the authority thus given to persons can by construction be so enlarged as to embrace animals also. The legislature, undoubtedly, in adopting this statute, contemplated that at least some judgment would be exercised by the person before killing the dog; that he would take some steps to ascertain whether the dog was licensed and collared before killing him, and if found not properly licensed and collared, then for that reason and that alone he should be killed. No such judgment or discretion could have been exercised in this case, nor can there be any pretense that the dog was killed because he was found running at large contrary to the provisions of the act. We think the court erred, therefore, in its second charge to the jury. The court also erred in refusing to charge as requested by plaintiff's counsel. If the plaintiff had complied with the provisions of the act by having his dog properly licensed and collared and by accident the collar was lost, a reasonable time must have been allowed the plaintiff to discover that fact and replace it. There is so much justice and common sense in thus allowing the owner time to discover and replace the lost collar that no argument is required to demonstrate it.

The judgment must be reversed, with costs, and a new trial awarded.

The other justices concurred.

Judgment reversed.

PEOPLE V. BROWN.

(24 Mich. 332.)

Bigamy — void second marriage.

It is no defense to an indictment for bigamy that the second marriage was between persons forbidden by statute to intermarry — as between a negro and a white woman.

INFORMATION for bigamy. The opinion states the case.

A. J. Smith, attorney-general, for the People.

James H. Garlock, for respondent, to the point that to sustain a conviction for bigamy the second marriage must have been such a one as would have been in all respects legal and valid except for the fact that the defendant then had a former wife living, cited : 3 Greenl. Ev., § 205 ; Bishop on Stat. Cr., § 592 ; *Reg. v. Fanning*, 17 Irish C. L. 289 ; 10 Cox's C. C. 411 ; *Burt v. Burt*, 2 Swaby & Tristram, 88 ; *Carmichael v. State*, 12 Ohio St. 554 ; *Hayes v. People*, 25 N. Y. 390 ; *Reg. v. Mills*, 10 Cl. & F. 689.

COOLEY, C. J. The defendant seeks to avoid the penalties of a bigamous marriage by showing that he is a negro, and that the other party to the marriage was a white woman, with whom under the statute it was impossible for him to contract marriage at all. Comp. L., § 4724. The argument is, that if the ceremony of marriage had taken place between parties who, if single, would be incapable of contracting marriage, the marriage ceremony is merely idle and void, and the respondent cannot be said to have been married a second time at all.

The logic of the argument is not very obvious. It certainly cannot be based upon any idea that there must be something of binding and obligatory force in the second marriage ; for every bigamous marriage is void, and it is the entering into the void marriage while a valid marriage exists that the statute punishes. Nor can we understand of what importance it can be that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another also.

The authorities sanction no such doctrine. There are loose statements in some of the cases that the second marriage must have been one that, but for the existence of the first, would have been valid ; but these evidently relate to the acts and intent of the parties, and not to the legal ability to unite in a valid relation. It was decided in *Rex v. Penson*, 5 C. & P. 412, that bigamy was committed in marrying a woman under an assumed name, though by law such a marriage between persons capable of contracting would be void. The case of *Regina v. Brawn*, 1 C. & K. 144, was similar

Hayes v. Livingston.

to the present in its facts, and Lord DENMAN in summing up said: "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it never could exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterward by either of the parties during the life-time of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and, therefore, null and void, does not signify, for the woman, having a husband then alive, has committed the crime of bigamy, by doing all that in her lay by entering into marriage with another man." These cases are recognized in the case of *Hayes v. People*, 25 N. Y. 390, which is relied upon by the respondent, but which affords no countenance for his exceptions.

The recorder's court must be advised that we find no error in the record, and that judgment should be pronounced on the verdict.

The other justices concurred.

Judgment affirmed.

HAYES V. LIVINGSTON.

(84 Mich. 384.)

Estoppel in pais — rule of, as to real estate — cannot operate to transfer title — statute of frauds.

Under the statute of frauds it is not permissible that an estoppel *in pais* should work a transfer of the legal title to land.

A mortgage on land was foreclosed and the land sold. It was then agreed between A, the mortgagor, and B, a second mortgagee, that B should buy up the title under the first mortgage foreclosure sale, and should then sell the land, and after deducting the amount of his own mortgage, and the sum paid for the title, pay over the balance of the proceeds to A. This arrangement was carried out and the land was sold by B to C to whom A represented that the title was in B; but it turned out that the foreclosure of the first mortgage was invalid, and that the title was still in A. *Held*, that he was not estopped from asserting it against C because, otherwise, it would be permitting an estoppel, resting in parol, to transfer the title contrary to the statute of frauds.

ACTION of ejectment to recover possession of land. The opinion states the case.

Hayes v. Livingston.

William O. Webster, for plaintiff in error, argued that the legal title to land cannot pass by parol under the provisions of the statute (Comp. L. 1871, § 4692); that in ejectment to the legal title only, and the right of possession under it, is involved, and an equitable title, however clear and indisputable, will not support the action (Tyler on Ejectment, 75; Adams on Ejectment, 32; 2 Greenl. on Ev., § 331; *McPherson v. Walters*, 16 Ala. 714; *Hamlin v. Hamlin*, 19 Me. 141; *Delaplaine v. Hitchcock*, 6 Hill, 14; *Whitney v. Holmes*, 15 Mass. 152; *Ryder v. Flanders*, 30 Mich. 336); that the legal title cannot be parted with by mere waiver, or transferred by an estoppel resting in parol. *Gugins v. Van Gorder*, 10 Mich. 523; *Whiting v. Butler*, 29 id. 122; *Smith v. Mundy*, 18 Ala. 182; *Gimon v. Davis*, 36 id. 589; *Jackson v. Demont*, 9 Johns. 60; *Swick v. Sears*, 1 Hill, 18; *Mills v. Graves*, 38 Ill. 455; *Wales v. Bogue*, 31 id. 464; *Blake v. Fash*, 44 id. 302; *Hurd v. Cushing*, 7 Pick. 169; *Heard v. Hall*, 16 id. 457; *Hale v. Skinner*, 117 Mass.

Mitchel & Pratt, for defendant in error, conceding that where, as in this State, the distinction between legal and equitable jurisdiction is kept up, the legal title, so far as relates to the right of possession, must prevail, argued that a plaintiff in ejectment makes out a case when he shows title or right of possession, or any state of facts which estops the defendant from denying his title or right of possession (*Gugins v. Van Gorder*, 10 Mich. 523; *Clee v. Seaman*, 21 id. 287); that equity will not permit the statute of frauds to be used as a means of promoting the fraud it was designed to prevent, and that the doctrine of equitable estoppel should be adopted in legal tribunals, and applied as broadly as in courts of equity (2 Smith's L. C. 651; *Rangeley v. Spring*, 21 Me. 130); that an award upon a parol submission to arbitration of disputed titles has been held to operate by way of estoppel to preclude either party from asserting title in opposition to the award (*Robertson v. McNeil*, 12 Wend. 578; *Clark v. Wethey* 19 id. 320; *Caery v. Wilcocks*, 6 N. H. 177; *Doe dem. v. Rosser*, 3 East, 15; Bigelow on Estoppel, 607); that examples are abundant where in cases of dedications the owner has been held estopped by acts *in pais* from asserting his title to land (and see *Cleland v. Taylor*, 3 Mich. 201); and upon the main proposition the following authorities are cited: Bigelow on Estoppel, 606-7; *Hatch v. Kimball*, 16 Me. 146; *Morse v. Child*, 6 N. H. 521; *Thomson v. Sanborn*, 11 id. 201; *Shaw v.*

Hayes v. Livingston.

Beebe, 35 Vt. 205; *Halloran v. Whitcomb*, 43 id. 306; *Brown v. Wheeler*, 17 Conn. 345; *Johnson v. Conn. Bk.*, 21 id. 148; *Sayles v. Smith*, 12 Wend. 57; *Presbyterian, etc., v. Williams*, 9 id. 147; *Corkhill v. Landers*, 44 Barb. 218; *Medley v. Williams*, 7 Gill & J. 61; 6 Harris, 343; *Clark v. Diggs*, 6 Ired. 159; *Duncan v. Duncan*, 3 id. 317; *Pool v. Lewis*, 41 Ga. 162; *Burkhalter v. Edwards*, 16 id. 593; *Thompson v. Wheatly*, 8 S. & M. 499; *Winnie v. Cole*, 1 Miss. 119; *Doe v. Pritchard*, 11 S. & M. 327; *Leland v. Wilson*, 34 Tex. 79; *Cornelius v. Burford*, 28 id. 202; *Morrison v. Keeler*, 13 La. Ann. 543; *Davison v. Sillman*, 24 id. 225; *Spears v. Walker*, 1 Head, 166; *Merriweather v. Larmon*, 3 Sneed, 447; *McAfferty v. Conover*, 7 Ohio St. 99; *Shaw v. Potter*, 50 Mo. 281; *Fair v. Howard*, 6 Nev. 304; *Davis v. Davis*, 26 Cal. 23.

COOLEY, C. J. In the court below Livingston recovered a judgment in ejectment on the strength of an estoppel *in pais*. His case was that Hayes, whose title to the land at a former time was conceded, had given two mortgages upon it, one of which had been foreclosed under the power of sale, and the land sold to a third party; that the other being held by one Corey, an arrangement was made between him and Hayes, under which Corey was to buy up the title under the foreclosure, and then, when he should be able to find a purchaser, sell the land and from the proceeds take out the amount of his mortgage and the amount he should have paid for the foreclosure title, and pay over the remainder to Hayes; that this arrangement was carried out so far as concerned the purchase of the foreclosure title, and that subsequently Corey sold to Livingston, being first told to do so by Hayes, and Livingston not making the purchase until assured by Hayes that the land was Corey's, though the latter was to pay over to Hayes a surplus from the purchase-price when the sale was made. This case was disputed by Hayes, who claimed that whatever was paid by Corey in acquiring the foreclosure title was only a loan to be repaid with interest. The dispute as to these facts would not have been important in the ejectment suit, had the foreclosure title proved to be valid, but it was claimed on one side, and conceded on the other, that it was defective, and left the legal title in Hayes. But Livingston insisted that Hayes, by his arrangement with Corey, and by telling Livingston, after Corey bought, that the latter was owner, had estopped himself from setting up

any title in opposition to that which Livingston had acquired in reliance upon his own statement; and the circuit judge so instructed the jury. The jury having found the facts to be as claimed by Livingston, a verdict and judgment in his favor followed as of course.

If the rule of estoppel *in pais* is the same when the right to real property is involved as it is when only personalty is in question, the circuit judge was undoubtedly right in his instruction. The principle is so old that it has ceased to be brought into controversy, that when one has knowledge that his own chattels are being sold as the property of another, and encourages the sale without asserting his right, or even by his silence allows a purchase to be made in ignorance of his title, he shall not thereafter be permitted to assert such title to the prejudice of the purchaser. The rule is as sound in morals as it is indisputable in point of law; and has often been recognized in this court. *Dann v. Cudney*, 13 Mich. 239; *Truesdail v. Ward*, 24 id. 117; *Meister v. Birney*, id. 435.

But a difficulty arises when it is proposed to apply the same principle to real estate. The statute of frauds is express that no interests in lands, with certain exceptions which are unimportant here, shall be created or transferred otherwise than by deed; and although it is perfectly true, as is shown by Mr. Bigelow in his treatise on the law of Estoppel (p. 606), that where one by his conduct is precluded in law from asserting his title in property, there is strictly no transmission of title, yet this is a mere technicality; the legal consequences are precisely the same, and for all practical purposes the estoppel works a conveyance. It would hardly be creditable to the administration of the law if the application of a statute so important as the statute of frauds should be turned away and defeated by a technicality so shadowy and unsubstantial.

It is not to be denied, however, that there are several cases which apply the doctrine of estoppel indiscriminately to both real and personal estate. The cases in Maine are very decided. *Hatch v. Kimball*, 16 Me. 146; *Durham v. Alden*, 20 id. 228; *Rangeley v. Spring*, 21 id. 13; *Copeland v. Copeland*, 28 id. 525; *Stevens v. McNamara*, 36 id. 176; *Bigelow v. Foss*, 59 id. 162. These cases appear to have overruled *Hamlin v. Hamlin*, 19 Me. 141. The following are usually referred to as supporting the Maine cases: *McCune v. McMichael*, 29 Ga. 312; *Beaupland v. McKeen*, 28 Penn. St. 124; *Shaw v. Beebe*, 35 Vt. 205; *Brown v. Wheeler*, 17

Hayes v. Livingston.

Conn. 345 ; *Brown v. Bowen*, 30 N. Y. 519 ; *Barham v. Turbeville*, 1 Swan, 437. Of these the Georgia case related to a parol partition of slaves acquiesced in until after the death of one of the parties, and was decided without any discussion of or reference to the distinctions between real and personal estate. The case in Pennsylvania was a suit on a promissory note given on a purchase of lands, the payment of which was resisted on the ground of failure of title. The persons in whom the title was alleged to be had been the plaintiff's agents in the sale, and had been paid a commission for making it; and they were held to be estopped from denying the plaintiff's right. It is to be observed of this case that the title was only incidentally in question, and also that in Pennsylvania the distinction between legal and equitable remedies is not kept up. In the Vermont case the court is contented to dispose of the question very briefly by saying that the rule of estoppel which is applied to personal property "upon reason and principle, to prevent fraud and promote justice, should be extended to real property." It would have been more satisfactory if the court had pointed out on what grounds, when the legislature, "to prevent frauds and promote justice," had applied wholly different rules to the transfer of personal property, and of real property, the courts could justify their action in venturing to abolish the distinction. The Connecticut case was one in which the question of estoppel related to a distribution of property which, though not in pursuance of the statute, had been sanctioned by a written agreement of the parties. In the New York case the complaint was of the flooding of the plaintiff's mill by a dam which set the water back upon it; and the question was, whether the defendants were estopped from asserting title to the land on which the mill stood, by the fact that the ancestor through whom they claimed had asserted no right at the time the plaintiffs bought the land and built the mill, though aware of all the facts. The case was begun and tried under the Code, which does away with the distinction between legal and equitable actions. The case in Swan goes to the extreme of sustaining an estoppel against an infant, and certainly would not be followed in this State. *Ryder v. Flanders*, 30 Mich. 336.

Some other cases may be mentioned which we think are distinguishable, though in some of them a doctrine is asserted as broad as that which is maintained by the cases in Maine. *Blackwood v. Jones*, 4 Jones' Eq. 56, was a case where one by his conduct was

held estopped from asserting a lien upon lands. Besides being in equity, it may be said of the case that what was in dispute was not the title, but something supposed to incumber it. *Water's Appeal*, 35 Penn. St. 523, was where the estoppel related to a claim to surplus moneys on a sale of lands. *Stevens v. Dennett*, 51 N. H. 324, was one where the doctrine was applied to the use of a well on the land of another, to which the party claimed right by user. *Winchell v. Edwards*, 57 Ill. 41, was a case in which it was held that one was precluded from asserting a secret equitable title as against the legal title, and is obviously not in point. *Pool v. Lewis*, 41 Ga. 162, was one in which the estoppel concerned the right to rely upon a verbal agreement concerning the flow of water in a natural water-course, and like the last, has no application. *Mariner v. Milwaukee, etc., R. R. Co.*, 26 Wis. 84, was a case of election between taking lands and taking moneys. *Platt v. Squire*, 12 Metc. 494, was one where the question was as to the actual payment of a mortgage. *Gill v. Denton*, 71 N. C. 341; S. C., 17 Am. Rep. 8, was where an officer who had induced a person to buy lands by representing them to be free from liens, was held estopped from afterward claiming the lands on a purchase under an execution which was held by him when the representations were made. Manifestly neither this case nor that in *Metcalf* involves the question we are now considering.

The following were either cases in equity or cases in which, under permission of the statute, an equitable defense was relied upon: *Wendell v. VanRensselaer*, 1 Johns. Oh. 344; *Storrs v. Barker*, 6 id. 166; *Tilton v. Nelson*, 27 Barb. 595; *Barnes v. McKay*, 7 Ind. 301; *Snodgrass v. Ricketts*, 13 Cal. 359; *Fay v. Valentine*, 12 Pick. 40; *Foster v. Bigelow*, 24 Iowa, 379; *Junction R. R. Co. v. Harpold*, 19 Ind. 347; *Burns v. Taylor*, 23 Ala. 255; *Newsome v. Collins*, 43 id. 656. These cases have no necessary bearing, and their correctness may be conceded. Equity may always compel the owner of the title to release it where that is the proper redress for a fraud committed by him in respect to the title; but the remedy is properly administered by compelling the fraudulent owner to convey, instead of treating the case as one of estoppel in the strict sense.

The following were cases in which the doctrine of estoppel was applied to a voluntary adjustment of boundaries between contiguous estates: *Robinson v. Justice*, 2 Penn. St. 19; *Spiller v. Scribner*,

Hayes v. Livingston

36 Vt. 245 ; *Halloran v. Whitcomb*, 43 id. 306 ; *Merriweather v. Larmon*, 3 Sneed, 447 ; *Spears v. Walker*, 1 Head, 166 ; *Mc Afferty v. Conover*, 7 Ohio (N. S.), 99 ; *Gove v. White*, 23 Wis. 282. The principle of these cases has been approved in this State. *Reed v. Drake*, 29 Mich. 222 ; *Stewart v. Carleton*, 31 id. 270. It is not supposed that in such cases the title is affected. The parties have only by their agreement and conduct determined the limits of their respective ownerships. Cases like that of *Noyes v. Ward*, 19 Conn. 250, which was one of the dedication of lands to public uses, have no application, because dedications are not within the statute of frauds. They would not be referred to at all but for the fact that they are sometimes spoken of as cases of estoppel. *Gugins v. Van Gorder*, 10 Mich. 523, on which some reliance is placed in this case, is not at all in point. In that case the grantee in an unrecorded deed had consented to its destruction, and to the conveyance of the land described therein to a third party, who, by recording his deed, became the apparent owner of a record title, as he was unquestionably the owner in equity. Afterward a title was asserted under the destroyed deed, and the question was of the right to introduce parol evidence of its existence and destruction. Justice MANNING, after pointing out that the case was within the statute of frauds, and that the destruction of the deed did not affect the title, proceeded to say: "Secondary evidence cannot be received to prove a fact without first laying a foundation for it in accounting for the absence of that which is primary. The deed to Goodrich is the best evidence of title. This is not produced, and its destruction is accounted for in a way that shows it would be dishonest in him to claim any thing under it. It was destroyed in pursuance of an agreement between him and his grantors, after the purchase-money had been returned to him, with a view of revesting the title. It was done with his consent and for a valuable consideration. The law will not recognize such a state of facts as an excuse for the non-production of the deed. Its language to Goodrich would be, if he was defending, 'Sir, you are estopped by your own acts from proving the contents of the deed by parol evidence;' and the defendant who claims through him has no greater rights than he." It thus appears that the only question in the case was one of primary and secondary evidence. Had the deed, when the transaction took place, been laid aside instead of being destroyed, and subsequently been brought forward and relied upon, the case would

have been wholly different, and nothing said by Justice MANNING would have had application. In such a case the right of property would have been involved; in the case actually considered it was only the quality of the evidence to establish the right.

The following cases have more or less bearing on the question involved in this suit. In *Jackson v. Shearman*, 6 Johns. 19, 21, it is said by the court that parol acknowledgments as to the title to real property "are generally a dangerous species of evidence; and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title. This would be to counteract the beneficial purposes of the statute of frauds." In *Jackson v. Vosburgh*, 7 Johns. 186, parol evidence of a disclaimer of title was rejected on the same ground. In *Wright v. DeGross*, 14 Mich. 164, it was decided by this court that an estoppel could not be made out against a widow's claim to dower, by showing that she, as administratrix of her husband's estate, had sold the land and agreed to assert no claim on her own behalf. In *Parker v. Barker*, 2 Metc. 423, a parol promise to release a mortgage interest in lands was held inoperative, although acted upon, the case corresponding in principle with the one last cited. The point here involved was directly passed upon in *Swick v. Sears*, 1 Hill, 17, 19. There, in reviewing a trial in ejectment, BRONSON, J., says: "Evidence was offered to show that the plaintiff stood by and not only saw the defendant buy of others, but advised him to do so, without disclosing the title which he now sets up. The evidence was properly rejected. The plaintiff is not estopped in a court of law to assert his title." "If the defendant finds it necessary to rely upon this part of the case, he must go into a court of equity." This case is not referred to in the subsequent case of *Brown v. Bowen*, 30 N. Y. 519, and it is to be presumed that the last case was supposed to be distinguishable. *Davis v. Davis*, 26 Cal. 23, while it was not decided that the doctrine of estoppel was inapplicable where the title to real estate was in question, the danger of applying it to the overthrow of the statute of frauds was very distinctly pointed out. The question is distinctly met in *Doe v. Walters*, 16 Ala. 714, in which it is said by DARGAN, C. J., delivering the opinion of the court, that "the title to land can pass only by deed, and an estoppel at law, which works a divestiture of title, can be created, in my opinion, only by as high evidence. I have looked with some care into the English cases, but I have

Hayes v. Livingston.

not found one in which a plaintiff at law was held to be bound by a parol estoppel, when the subject-matter was such that the title could pass only by deed. If the title could pass by delivery, or by parol, then a party shall be bound by a parol estoppel ;” and the learned judge quotes, among other cases, that of *Knight v. Wall*, 2 Dev. & Bat., as deciding that “title to slaves could not be made out at law by a parol estoppel ; and if fraud had been practiced on the party, he must seek his redress in equity.” To this effect also, *West v. Tilghman*, 9 Ired. 163, may be referred to. And as to the doctrine in Alabama, further reference may be made to *Smith v. Mundy*, 18 Ala. 182. The decisions in Illinois are equally clear and pointed. In *Mills v. Graves*, 38 Ill. 455, 466, where the precise question was involved, WALKER, C. J., says : “Had the acts which were proved constituted an estoppel, it would have been simply an equitable right incapable of assertion in a court of law. *Wales v. Bogue*, 31 id. 464. There can be no pretense that mere oral declaration can ever transfer the legal title ; and equitable titles and demands are not cognizable in a court of law. Even if this were such an estoppel as the defendant claims, the legal title is in Ellis’ heirs or grantees. After a careful examination of the adjudged cases, we are unable to find that such estoppels can be made available in a court of law. Estoppels relating to real estate, so far as we can find, have been uniformly enforced in courts of equity, and usually by injunction ; and this is manifestly in accordance with the analogies of the law.” In *Blake v. Fash*, 44 id. 302, this doctrine is reaffirmed by Mr. Justice BREESE, speaking for the court. It also had the approval of this court in *Ryder v. Flanders*, 30 Mich. 336, 344, where it was distinctly denied in an opinion by Mr. Justice CHRISTIANCY that an equitable estoppel can constitute a defense at law.

Upon this statement of the cases it is apparent that, while there are authorities both ways, it cannot be said that the weight of authority is with the ruling below, unless the case of settlement of boundary lines and those of dedication are in point. The first have not usually been disposed of on that ground, but, on the contrary, such settlements, when acquiesced in, are supported for the very reason that they pass no title, but only define what it is that the title embraces. And surely cases of dedication are foreign to this question. A dedication is in one sense a conveyance, but it is neither within the mischiefs the statute of frauds was aimed at,

nor does the statute come in question in making it out. It is a gift publicly made with tender of possession, and publicly accepted ; and is as free from a likelihood of being affected by frauds and perjuries as almost any supposable case ; and it is as well made out by oral declarations as by any formal conveyance. But a grant to an individual is not suffered to be thus made ; if it were, it would be needless to invoke the doctrine of estoppel in support of an oral transfer. Indeed, in those cases of dedication in which estoppel is discussed, it is not strictly estoppel that is in question, but rather the right of the party to recall his gift. To treat such a question as one of estoppel, is a careless use of terms. But conceding the doctrine of estoppel to apply in cases of dedication, the question here at issue is still untouched ; for here the question is, how we are to get over or evade the statute of frauds, which in cases of dedication is not involved.

The suggestion that the application of the estoppel only prevents circuity of action, is one which overlooks the distinction between legal and equitable remedies. It may be plausibly urged that no such distinctions should be kept up ; but they are kept up, and until recently in this State — as is still the case in some others — the practice in equity has permitted some evidence to be reached which was not available at law. This is no longer the case in this State ; but there is nothing in our legislation which permits cases where one claims that equitably the title or the possession of lands should be awarded to him because of the fraud of the legal owner, to be tried as common-law cases by jury. Perhaps one reason for this may be that jurors are not likely to understand and appreciate the importance of an adherence to the statute of frauds so well as those who have been educated in a knowledge of the reasons which led to its enactment ; and a jury might, therefore, be overready to set aside titles on parol evidence of mere words or mere failure to utter words. But whatever may be the reasons, and whether satisfactory to ourselves or not, we are not at liberty to disregard the fact that the legislation of the State still leaves equitable claims to be tried in the courts of equity. And when one asserts that the owner of land ought to surrender it to him, because of the owner's fraudulent acts and conduct, it is manifest that his claim is only an equitable claim, set up and asserted against the legal claim. The one has the legal title, and the other seeks to overthrow it by proving a superior equity. This he may be able to do in a court of

Hayes v. Livingston.

equity, but we cannot admit that at law the legal title is not entitled to prevail.

Those cases in which it has been decided that a deed given by one assuming, but without authority, to be agent for the nominal grantor, cannot be ratified by parol, are not without a bearing in this connection. *Despatch Line of Packets v. Bellamy Manf. Co.*, 12 N. H. 205, 231; *Blood v. Goodrich*, 9 Wend. 68; *Hunter v. Parker*, 7 M. & W. 322, 343. The parol ratification, especially if accompanied by an acceptance of the purchase-price, is certainly sufficient to make out a case of strong equity, if that were all that was needful to the estoppel.

But apart from all authority, the reasons against such an application of the doctrine of estoppel appear to us entirely conclusive. Our title deeds are supposed to be the best possible protection to estates, and the policy of the law makes them so. They prove themselves, and the record of them is notice upon which every one may rely in bargaining for and in acquiring lands. The law does not permit the title to rest in parol, nor does it allow any thing which is evidenced by the deeds to be changed on parol testimony of promises, agreements or understandings. But by this doctrine, while the instruments of title are conceded to be indisputable, they are allowed to be set aside on parol evidence of the owner's admissions or statements, though this species of evidence is confessedly the least reliable of all which the law admits. The best evidence of title is thus allowed to be overcome and set aside by the weakest. A conversation misunderstood or falsely reported controls the most perfect chain of conveyances, and any estate — the most valuable in the land equally with the most worthless — is liable to be taken from the owner on the impression which a jury receives of the preponderance of evidence concerning words which witnesses may have imperfectly heard, or incorrectly understood, or the purport of which they may have unintentionally colored, or purposely wrenched from the real meaning in the mind of the speaker. The evils against which the statute of frauds was aimed are all here in their most threatening form; and it seems to us a trifling with the statute to refuse to apply it to a case clearly within its spirit, when in order to exclude it from the letter it is necessary to put the title out of view and deny that it is involved, though the decision is effectually to dispose of it.

Ward's Central and Pacific Lake Company v. Elkins.

The judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

Judgment reversed.

WARD'S CENTRAL AND PACIFIC LAKE COMPANY v. ELKINS.

(84 Mich. 439.)

Damages — for failure to transport ordinary merchandise.

Action against a carrier for breach of his agreement to carry salt by water to a market. *Held*, that the measure of damage was the excess in value at the place of destination at the time when it should have arrived there, over its value at the place of shipment and the agreed rates for transportation; and that the extra expense of transporting it by land was not recoverable.

ACTION to recover damages for breach of contract to carry salt. The opinion states the case.

Moore, Canfield & Warner, for plaintiff in error.

Alfred Russel, for defendant in error.

CAMPBELL, J. Elkins recovered damages against the plaintiff in error for failure to carry certain salt from Bay City to Chicago, in November, 1874.

Elkins was a salt dealer in Chicago, and sued upon an alleged contract whereby the plaintiff in error was to carry three cargoes of salt, of about seventeen thousand bushels in all, only one of which was taken. The cargoes were to be called for from the 15th to the 20th of November. The regular business of plaintiff in error was between Buffalo and Duluth, with power, as was claimed, to do business elsewhere on the lakes.

Elkins gave evidence tending to show that he could not get vessels to carry the salt after plaintiff's default. He had it taken by rail to Chicago in lots as he wanted it, from January to some time in April, 1875, and was allowed to recover the difference between the price agreed on with plaintiff and what he paid for the transportation by rail. This is the chief error complained of.

We do not see upon what rule this recovery can be justified. The damages to which Elkins was entitled, if any, would be such as

would have placed him in the position he would have occupied had the salt been taken to Chicago by vessel as agreed. It was not an article of specific utility for preservation, but an article of merchandise, and only valuable as such. The only advantage he could have gained by a timely shipment according to contract would have been the excess of the value of salt in the Chicago market at the date when it should have arrived, beyond what it was worth in Bay City and the expenses of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that, and nothing more.

He would not have been justified in procuring shipment by rail, if the railroad prices would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption, always to be found in the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account. *Le Blanche v. London & N. W. R. W. Co.*, L. R., 1 C. P. D. 286.

When such a necessity exists, it is maintained only as a necessity, and allowed because of its urgency. If such a rule is ever applicable, it cannot be satisfied by allowing a party, instead of seeking other means of carriage immediately at hand, to await his leisure and speculate on future chances, and make shipments piecemeal as was done here.

It is altogether likely that after the close of navigation, and as the winter goes on, prices may rise so as to warrant shipments by rail, when this would not have been profitable earlier; and it may be possible, after paying railroad rates, to make as much profit as if the salt had been received by steam on the lakes and put in market in the fall at fall rates. It would be absurd to say that these deliberate winter shipments were necessitated or justified by failure to get shipping facilities during the season, or near the close of navigation in November. It would be equally unjust to allow the

Ward's Central and Pacific Lake Company v. Elkins.

owner of the salt to speculate on the chances of a market without risk to himself.

The rule of damages should have been as previously indicated, and should in no case exceed the damages actually incurred. A party who has lost nothing by a breach of contract is not entitled to damages of a substantial character.

We think there was also error in allowing the statements of a steamboat clerk, who was not shown to occupy any position of general agency, to be received in evidence to bind the company; and that improper questions were allowed, which called for the inferences of a witness rather than the actual terms of the contract in suit. But we do not enlarge upon these, as they are not likely to arise again, and the main issue is upon the question of damages and the real terms of the agreement, as absolute or conditional.

The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred. .

Judgment reversed.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE

ADAMS v. BLETHEN.

(66 Me. 12.)

Negotiable instrument — indorsement — limitation of special indorsement.

The payee of a negotiable note wrote and signed his name to the following words upon the back thereof : " I this day sold and delivered to Catherine M. Adams the within note." *Held*, that he was liable as an ordinary indorser.

ASSUMPSIT against the defendant, Blethen, as indorser of a negotiable promissory note payable to his order and by him transferred to the plaintiff, as stated in the opinion. At the trial the presiding judge ruled as matter of law that under the indorsement upon the face of the paper the defendant was not liable as an indorser, and excluded evidence offered by the plaintiff that the agreement between the parties was that the defendant should be liable.

After the evidence was out, the action was withdrawn from the jury and submitted to the law court. If the action was maintainable, it was to stand for trial ; if not, the plaintiff to be nonsuited.

J. C. Madigan & J. P. Donworth, with whom were *W. M. Robinson & J. B. Hutchinson*, for plaintiff.

L. Powers, for defendant.

Wing v. Wing.

PETERS, J. The defendant, payee of a negotiable note, signed his name on the back of it under these words: "I this day sold and delivered to Catharine M. Adams (plaintiff) the within note." We think that the defendant thereby assumed all the liabilities of an ordinary indorsement of the note. No word in the writing indorsed upon the note negatives or qualifies such an idea. The liabilities implied by indorsing a note can be qualified or restricted only by express terms. Here the only restriction is, that the indorsement is made special to Catharine M. Adams. The defendant declares that he sold and delivered the note. Every indorser of a bill or note impliedly says the same thing by his indorsement. The defendant did sell and deliver the note, and by making that declaration over his name on the back of it he also agreed to pay the note to the plaintiff according to its tenor, upon seasonable notice, if the maker did not pay it. His contract is in part expressed and in part implied. Any indorser of a note may be properly styled a seller of the note by him indorsed.

The counsel for the defendant contends that, inasmuch as a complete contract of mere sale is set out in express terms, no more than a sale can be implied. But implied undertakings are annexed to many written contracts, and especially to those declared in short and imperfect terms. The warranty of title to a thing sold is rarely expressed, but usually implied, in a written contract of sale. Many illustrations of the principle could be given.

There is evidently some error in the report or the testimony, about the date of the demand and notice claimed to be proved by the plaintiff, which can be corrected upon a new hearing.

The action to stand for trial.

WING v. WING.

(66 Me. 62.)

Slander — words imputing trespass on real estate.

The words "A stole windows from B's house" are not in their ordinary sense actionable as imputing either larceny or an act of malicious trespass upon real estate.

Wing v. Wing.

ACTION on the case for slander in uttering the words set forth in the opinions. The defendant demurred to the declaration and the demurrer being sustained, the plaintiff excepted.

I. W. Davis, for plaintiff.

L. Barker & L. A. Barker, for defendant.

PETERS, J. The words alleged to be actionable are: "Almon Wing stole windows from Benjamin Jordan's house." There being no special averments, it is to be presumed that the words were used in their ordinary and popular sense. The plaintiff impliedly so avers, there being no express averment to the contrary. That is one rule of construction. Another rule is that all the words spoken, so far as necessary to ascertain the meaning of the person who utters them, must be considered together. The sense of actionable words may be so far qualified by subsequent words spoken in the same connection, that the words taken together are not actionable. Therefore, if a person is charged with stealing, under such circumstances as show that a felony was not capable of being committed, the words are not to be regarded as actionable. Among the illustrations of this rule is the familiar one found in the books, and stated in Bac. Abr. (Title Slander) in this way: "If J. S. say to J. N., 'thou art a thief, and hast stolen my trees,' no action lies, it appearing from the latter words, that the whole words only import a charge of a trespass." *Allen v. Hillman*, 12 Pick. 101; *Dunnell v. Fiske*, 11 Metc. 551; *Edgerley v. Swain*, 32 N. H. 478. See, also, numerous cases cited in note to the case of *Brooker v. Coffin*, 1 Am. Lead. Cases, 76.

Tested by these rules, our opinion is, that the words uttered by the defendant do not impute the crime of larceny, but amount to an accusation of only a trespass upon real estate. The meaning conveyed by the words is at least doubtful. They may be susceptible of different constructions, perhaps. But words cannot be regarded, upon demurrer to the declaration, as actionable, unless they can be interpreted as such, with at least a reasonable certainty. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the rule requires him to make the meaning certain by means of certain colloquium and averment. It is always within his power to do so. *Robinson v. Keyser*, 22 N. H. 323; *Emery v. Prescott*, 54 Me. 389.

“Windows” are, strictly, a part of a house, and ordinarily affixed permanently thereto. If the defendant had intended to charge a theft of windows which were not a part of a house, the form of expression would more naturally have been, that the plaintiff “stole Benjamin Jordan’s windows;” or, “windows from Benjamin Jordan.” The fact that they were stolen at his house would seem to be rather an immaterial fact, to be so emphatically stated. If any other word implying violence or force is substituted for the word “stole,” the words complained of could not be tortured into an interpretation such as the plaintiff contends should be ascribed to them. *Haynes v. Haynes*, 29 Me. 247.

But the plaintiff maintains that, if the words do not impute the crime of larceny, they do impute at least the charge of a criminal act of trespass upon real estate, such as is described in the malicious mischief act, found in R. S., ch. 127, § 15; and that, in that view, the words are actionable. Whether it would be actionable in this State, to accuse a person of malicious trespass, we do not now decide. That might raise the question as to what offenses involve moral turpitude, social ostracism and disgrace. Upon that point the authorities disagree. There is a wilderness of cases upon the subject through which no beaten or well-defined track can be traced. In Indiana, such a charge is actionable. *Wilcox v. Edwards*, 5 Blackf, 183. In Pennsylvania, under a similar statute, it is not actionable. *Slitzell v. Reynolds*, 67 Penn. St. 54. (See in this connection, the contradictory cases of *Buck v. Hersey*, 31 Me. 558, and *Brown v. Nickerson*, 5 Gray, 1.) As to what words are actionable and what are not actionable, no marked rule has as yet been laid down, perhaps, in this State; and we do not feel called upon to pursue the discussion in the present case, because the words used here are not, in our judgment, appropriate, in their natural and popular sense, to convey the idea, that the plaintiff has “maliciously and willfully” injured anybody’s real estate. It is difficult for us who know nothing of the subject-matter more than is indicated by the words themselves, to understand what they do mean. It would rather seem that they were used in an exaggerated and rhetorical sense than in any other way, to express a forcible act done under some controverted claim of possession or ownership in the property alluded to. To constitute a “malicious and willful” injury to a building it is not

Meador v. White.

enough that the injury was willful and intentional ; but, in order to create the criminal offense, it must have been done out of cruelty, hostility or revenge. 4 Bl. Com. 244 ; *Commonwealth v. Walden*, 3 Cush. 558 ; *Commonwealth v. Williams*, 110 Mass. 401 ; *State v. Hussey*, 60 Me. 410. Here nothing more is clearly implied than that a forcible trespass was committed. The word "stole" would rather imply that the windows were carried away for purposes of value and gain, and not that they were severed from the house, in order revengefully to inflict an injury upon the owner. *Commonwealth v. Gibney*, 2 Allen, 150.

Exceptions overruled.

MEADOR V. WHITE.

(63 Me. 90.)

Sunday — action for money loaned on.

An action cannot be maintained to recover money loaned on the Lord's day.

ASSUMPSIT for money loaned by the plaintiff to the defendant on a Sunday. By agreement of the parties the case was submitted to the law court.

V. A. Sprague & M. Sprague, for plaintiff.

J. Crosby, for defendant.

APPLETON, C. J. The defendant borrowed of the plaintiff nine dollars on the Lord's day. Had he given his note for this sum, its collection could not have been enforced because of the statute forbidding secular business on that day. Whether the promise to repay is evidenced by a written memorandum or by a verbal promise, or rests upon an implied one, the same result must follow. The contract was illegal because made on a day when the making of contracts is forbidden, and the plaintiff cannot claim through an act prohibited by the statute. *Finn v. Donahue*, 35 Conn. 216; *Plaisted v. Palmer*, 63 Me. 576.

The moral obligation to repay money loaned is the same, whether the loan be made on one day or on another. It is an unfortunate

State v. Flemming.

condition of the law when the violator of its commands is rewarded by it for such violation. The defendant and the plaintiff are alike guilty of a violation of law ; the former in soliciting a loan, the latter in yielding to such solicitation. Both are liable to the penalty provided by the statute. But the defendant, while guilty with the plaintiff, and equally amenable to the penalties provided by the statute, is rewarded for his wrong-doing by the refusal of the law to aid in the enforcement of a debt justly due. He is absolved from an indebtedness created at his own instance ; while his associate in guilt, who yielded to his wishes, is liable to a double penalty, that inflicted by law, and that arising from the non-payment of money loaned in addition to the sorrows of a regretful conscience.

Juvenal indignantly says :

“*Multi*

Committunt eadem, diverso crimina fato ;

Ille crucem pretium sceleris tulit, hic diadema.”

So, now, of two criminals guilty of the same offense, one is punished and the other rewarded by the law, which creates the offense.

Plaintiff nonsuit.

STATE V. FLEMMING.

(66 Me. 142.)

Grand jury — venire — seal — amendment — remedial statute.

It is a good plea in abatement to an indictment that it was found by a grand jury summoned by venire not bearing the seal of the court ; and such defect is one which cannot be cured by amendment, nor can it be remedied by a special statute.

INDICTMENT for being a common seller of intoxicating liquors without a license. Plea in abatement that one of the grand jurors by whom the indictment was found was drawn pursuant to a supposed writ of *venire facias* which was not under the seal of the court. To this plea the county attorney demurred generally, and the court sustained the demurrer.

At the same term of the court at which said indictment was found the grand jury returned a large number of other indictments

State v. Flemming.

for violations of the liquor law; and when it was discovered that the venires for the grand jury had been issued without the seal of the court upon them, it was claimed that this defect was fatal to the validity of the indictments; on application, the legislature then in session passed an act declaring the indictments valid. A motion was also made to have the venires amended by affixing a seal to them. These questions were also submitted to the court.

I. Varney and *F. H. Appleton*, for defendant, cited the following authorities as to the sufficiency of the plea: 2 Lil. Ent. 675; 2 Tidd's Pr. 714; 5 Bac. Abr. 377, 380; 2 Hale's P. C. 260-1, 471; 2 Hawk's P. C. 277, 347, 371, 571-2; *State v. Lightbody*, 38 Me. 200; R. S., ch. 106, §§ 7, 9, etc.; ch. 134, § 1, etc., § 18; ch. 77, § 4; *Bailey v. Smith*, 12 Me. 196; *Tibbetts v. Shaw*, 19 id. 204; *Hall v. Jones*, 9, Pick. 446; *Smith v. Alston*, 1 Rep. Con. Ct. 104; *Governor v. McRhea*, 3 Hawks, 226; *Filkins v. Brockway*, 19 Johns. 170; *Brewer v. Sibley*, 13 Metc. 175; *State v. McElmurray*, 3 Strobb. (S. C.) 33; *Garland v. Britton*, 12 Ill. 232; *State v. Drake*, 36 Me. 366; *McQuillen v. State*, 8 S. & M. 587; *Rawls v. State*, id.; 1 Tidd's Pr. 583, 584, 589, 661; 1 Ld. Raym. 593; Willes, 479; *Colburn v. Tolles*, 13 Conn. 527; 1 Chitty's Pl. 366, 454-6, 460, 466; *State v. Middleton*, 5 Port. 491; 2 Saund. 209 a., note 1; 10 East, 87, note; Stephen's Pl. 161, 423, 437; 1 Saund. Pl. 4; Gould's Pl. 271, 397, and ch. 5, § 142; 1 Bac. Abr. 37 and 38, 223-227, § 237; *Baker v. State*, 23 Miss. 244; *State v. Williams*, 5 Port. 130; *Lynes v. State*, id. 236; 2 Wharton's Indictments, § 1158; *State v. Ward*, 63 Me. 225; 2 Saund. Pl. 297; 2 Salk. 497; *Findley v. People*, 1 Mich. 234; 3 Bl. Com. 303; 1 Lil. Ent. 1; 3 Chitty's Pl. 896; 3 M. & S. 154; 1 Sellon's Pr. 278; *Eichorn v. LeMaitre*, 2 Wils. 367; 2 Bl. 368; *Tompson v. Colier*, Yelv. 112; *Hazzard v. Haskell*, 27 Me. 549; *Fogg v. Fogg*, 31 id. 302; *Burnham v. Howard*, id. 569; *Southard v. Hill*, 44 id. 92, 95; *Severy v. Nye* 58 id. 246; *McKeen v. Parker*, 55 id. 389; *Lovell v. Sabin*, 15 N. H. 29; *Dearborn v. Twist*, 6 id. 44; *Ritler v. Hamilton*, 4 Texas, 325; *Kendrick v. Davis*, 3 Coldw. (Tenn.), 524; 4 Me. 439, *Low's case*; *State v. Burlingham* 15 id. 104; *State v. Symonds*, 36 id. 128; *State v. Clough*, 49 id. 573; *U. S. v. Coolidge*, 2 Ld. Raym. 1307; 5 Saund. 376; Yelv. 204.

L. A. Emery, attorney-general, and *J. Hutchings*, county attorney, for the State.

WALTON, J. The defendant is indicted for being a common seller of intoxicating liquors without a license. The indictment was found by a grand jury drawn by virtue of venirees not having the seal of the court upon them. He pleads this fact in abatement, and prays that the indictment may be quashed.

I. *Was a seal necessary.* Undoubtedly. The question is *res judicata* in this State. It was decided in *State v. Lightbody*, 38 Me. 200. The court there held, not only that a seal was necessary, but that the doings of a grand jury drawn by virtue of venirees not having the seal of the court upon them, were illegal and void, and liable to be quashed on motion. That a seal is necessary upon venirees for grand jurors is not, therefore, an open question in this State.

II. *Is the defect amendable?* We think not. Every indictment to be valid, must be found by a grand jury legally selected, and competent to act at the time the indictment is found. So decided in *State v. Symonds*, 36 Me. 128.

To put a seal upon these venirees now would not make sealed instruments of them at the time they were served. They have performed their office and are *functi officio*. To seal them now, and then hold that they were legal instruments when served, and when they had no seals upon them, would seem more like trifling than the performance of a grave and important duty.

Besides, this court has three times decided that the seal upon a writ is matter of substance and not amendable. *Bailey v. Smith*, 12 Me. 196; *Tibbetts v. Shaw*, 19 id. 204; *Witherell v. Randall*, 30 id. 168.

And the same point has been decided the same way in Massachusetts. *Hall v. Jones*, 9 Pick. 446.

In one case in this State, where the clerk omitted to affix the seal of the court to an execution, he was allowed to do so after it had been levied upon real estate. *Sawyer v. Baker*, 3 Me. 29. But the court afterward refused to allow a justice of the peace to make a like amendment; and referred to the above decision as having been made upon an *ex parte* motion; from which we infer that the court did not regard it as a reliable authority. *Porter v. Haskell*, 11 Me. 177.

“So long as a seal is required to be affixed to writs and executions,” said MELLAN, C. J., in the case last cited, “though we may

not be able to discover its real use, yet we must not dispense with what the law requires."

And in an early case in Massachusetts, the court said that, while a strict adherence to technical forms might be inconvenient in particular cases, and might even appear at times to be beneath the dignity of the law, still, it is essential to the correct administration of justice that some forms and methods of proceeding be observed; that if the court felt at liberty to depart from the existing forms, still, there would be a point at which it must stop at last; and then it would be found no easier to comply with the new forms than with those which have been so long known and settled; and the inconvenience would not be less than is now experienced when indictments and other proceedings should be quashed for a departure from such new forms. *Commonwealth v. Stockbridge*, 11 Mass. 279.

A distinction has sometimes been made between original and judicial writs, using the latter term to distinguish such writs as issue during the progress of a suit from those by which suits are commenced. And it has been said that while executions and other strictly judicial writs may be amended by having the seal of the court affixed to them, original writs cannot be thus amended. Such a distinction is referred to in *Bailey v. Smith*, 12 Me. 196.

But this distinction, if it exists, is not favorable to the proposed amendment in this case. Writs of *venire facias* for grand jurors are not judicial writs, in that technical sense in which the term is used to distinguish such writs as issue during the progress of a suit from those by which suits are commenced. They more nearly resemble original writs, which, it has been held, cannot be thus amended.

But we think the distinction is a very shadowy one, and we attach no importance to it in this case. We rest our decision upon the broad principle that in criminal prosecutions all the proceedings should be strictly according to law; and that when the law requires a writ to be sealed before it is served, sealing it after it has been served is not a compliance with the law.

III. *Is the plea in abatement sufficient in form?* We think it is. It states the ground of objection to the indictment in language too clear to be misunderstood by any one. Nothing more should be required in criminal cases. The strictest technical accuracy, such as has sometimes been required in purely dilatory pleas in civil

suits, should not be exacted in criminal cases. If the plea states a valid ground of defense in language too clear to be misunderstood, and is free from duplicity, nothing more should be required. In such cases the maxim, *aucupia verborum sunt iudice indigna* — a twisting of language is unworthy of the court — is particularly applicable. To require a degree of exactness which it is practically impossible to comply with, would be, in effect, a denial of the right to file such a plea at all. We think the plea is sufficient in form.

IV. We now come to the last and perhaps the most important question in the case. Pending this indictment, and in advance of the judgment of the court upon its sufficiency, the legislature passed an act declaring the venires for the grand jurors, by whom it was found, valid, notwithstanding they were issued without the seal of the court upon them; and declaring further that no act or presentment of said grand jurors should be in any wise invalidated by reason of such defect. Special Laws 1876, ch. 307.

Can such legislation be sustained? Is it within the constitutional authority of the legislature to enact that indictments already pending shall be valid, notwithstanding they have been found by a grand jury not legally drawn? Clearly not. This question was fully considered in *State v. Doherty*, 60 Me. 504.

The court there held that an act of the legislature that should attempt to validate indictments found by a grand jury not legally selected, would violate both the State and the United States Constitutions. That case was not decided upon any narrow ground. It was decided upon the broad principle that an indictment is not valid, and cannot be made valid by the legislature, unless it is found by a grand jury legally selected, organized and qualified, "in accordance with some pre-existing law." Such is the very language of the court; and the authorities there cited fully sustain the position.

And in an earlier case in this State the court decided that the legislature cannot, by act or resolve, dispense with a general law for particular cases. *Lewis v. Webb*, 3 Me. 326.

And Judge Cooley, in his work on Constitutional Law, lays it down as the result of all the authorities, that when the legislature undertakes to suspend the operation of the general laws of the State, the suspension must be general; that it cannot be made for individual cases, or for particular localities. Cooley's Const. Lim. 391.

Hussey v. Sibley.

The act in question is objectionable upon both of these grounds. It does not purport to change the general law of the State. It does not declare that in no case shall the seal of the court be essential to the validity of venirees for grand jurors. It does not declare that in no case shall an indictment be invalidated by such an omission. Nor is it to have effect in any other county than the county of Penobscot. It goes no farther than to declare that the venirees for this particular grand jury shall be valid, notwithstanding they were issued without the seal of the court upon them; and that no act of presentment of this particular grand jury shall be invalidated by reason of such defect; leaving the law with respect to all other counties, and all other grand juries in the county of Penobscot, and all other indictments, precisely as it was before. In other words, it was a direct attempt to dispense with the general law of the State, for a particular locality and for a particular class of cases. This, as we have already seen, cannot be done. Such an act is, in principle, as objectionable as a bill of attainder, or an *ex post facto* law.

The escape of criminals through defects in mere matters of form is always cause for regret. But it would be cause for much deeper regret if the court should disregard any well-settled rule of law in order to prevent such a result. We must not do evil that good may come. We must not ourselves become violators of the law in order to punish others. The remedy is the use of more care.

Indictment quashed.

HUSSEY V. SIBLEY.

(66 Me. 193.)

Payment — in worthless negotiable paper — mutual mistake.

A negotiable town order transferred by a debtor to his creditor, for the purpose of paying his debt, and received for that purpose—both parties acting in good faith—will not operate as a payment, if, at the time, it was worthless for the reason that the drawers and acceptor had no authority to make or accept it.

Hussey v. Sibley.

ASSUMPSIT to recover a balance due on a promissory note. The principal contention was as to the allowance as part payment of said note of the following order which defendant had passed to the plaintiff and plaintiff had accepted as part payment.

“ \$300.

May 14, 1869.

“ To Nehemiah Smart, town treasurer, or his successor. Pay to Charles Plaisted or order, three hundred dollars, it being for money paid the United States for the year 1863.

“ No. 58. (Signed)

“ JAMES FULLER,

“ ALEX WOODMAN,

“ I. A. MARRINER.

} *Selectmen*

of

} *Searsmont.*”

Accepted May 14, 1869, N. Smart, treasurer, without recourse to me. “CHARLES PLAISTED.”

The opinion states the further facts.

W. H. McLellan and *J. W. Knowlton*, for plaintiff, cited *Roberts v. Fisher*, 43 N. Y. 159 ; S. C., 3 Am. Rep. 680.

W. H. Fogler, for defendant. I. The defendant bought and received the order of his debtor, Whitney, surrendering a secured debt of more than \$300 and paying \$83 in money, and sold and delivered it to the plaintiff, in good faith.

II. If the defendant made the remark testified by the plaintiff (which is denied) that “the town order is just as good as money in hand when you get it to the town treasurer,” it would be a mere expression of opinion, and not a warranty. *Baxter v. Duren*, 29 Me. 434, 442 ; *Halbrook v. Conner*, 60 id. 578 ; *Bishop v. Small*, 63 id. 12 ; *Cooper v. Lovering*, 106 Mass. 77.

III. Nor was there any implied warranty. The seller of a written instrument, at the most, impliedly warrants but two things,—that he has the right to dispose of it and that the signatures are genuine. As to all other matters the rule *caveat emptor* applies. 2 *Parsons on Notes*, 41, 187 ; *Story on Notes*, § 118 ; *Baxter v. Duren*, 29 Me. 434, 440 ; *Burgess v. Chapman*, 5 R. I. 225 ; *Ellis v. Wild*, 6 Mass. 321.

An implied warranty does not extend to visible defects which are alike within the knowledge of vendor and vendee. *Chitty on Contracts*, 483, 484.

Hussey v. Sibley.

IV. Money paid under a mistake of law cannot be recovered back ; nor when voluntarily paid with knowledge, or means of knowledge in hand, of the facts. *Norton v. Marden*, 15 Me. 45, and cases ; *Norris v. Blethen*, 19 id. 348 ; *Jenks v. Mathews*, 31 id. 318, and cases ; *Mowatt v. Wright*, 1 Wend. 355.

The order was what it purported to be, a town order given “ for money paid the United States in 1863.” If the plaintiff made a mistake it was *ignorantia legis*, and he cannot recover by alleging it.

V. The defendant was induced to purchase the order by the plaintiff's promise to take it of him.

DANFORTH, J. This is an action to recover the balance due upon a promissory note upon which there are quite a number of indorsements. The indorsement of December 7, 1874, for \$375, and a part of that of December 26, 1874, it is agreed were made in consideration of an order drawn by the selectmen upon the town treasurer of Searsmont, and accepted by him. It is claimed by the plaintiff that the amount so indorsed should not be allowed in payment, as the order proved invalid and worthless. Whether it should be so allowed is the only question presented. Certain facts are undisputed. It is agreed that the order was given by the defendant, and received by the plaintiff as a payment upon the note, and that at its inception it was utterly void, and for that reason of no value when passed. That the plaintiff supposed it to be valid when he took it, the testimony leaves no room to doubt ; and the most favorable view of the testimony for the defendant is, that he was of the same opinion. The order was returned to the defendant within a reasonable time after it was received, and its want of value discovered. Under such a state of facts, both parties being equally innocent, no payment was made ; there was no value received for the indorsement. The defendant parted with nothing of value to him ; the plaintiff received that which yielded him no benefit.

In such cases there may have been some conflict of authority as to how far a party selling such paper as personal property is a warrantor of its genuineness or value ; but it is believed there is none whatever, as to its effect as a payment.

In *Baxter v. Duren*, 29 Me. 434, it was held that one who sells a promissory note as personal property, in the absence of an express agreement, would not be liable upon an implied warranty of the genuineness of the signatures if they should prove a forgery. The

same doctrine was held in *Ellis v. Wild*, 6 Mass. 321. But in both of these cases a distinction was made between a sale of such paper, and a transfer of it in payment of an existing debt; and it was conceded as a well-established rule of law that under the same circumstances the transfer would not operate as a payment of a prior debt, though made for that purpose.

In *Frontier Bank v. Morse*, 22 Me. 88, the plaintiff having received the bills of a broken bank, both parties being ignorant of that fact, in exchange for good ones, in a very elaborate opinion it was held that the loss should fall upon the payer, and that the plaintiff was entitled to recover the amount.

In *Young v. Adams*, 6 Mass. 182, a promissory note payable in foreign bills was taken up by such bills, one of which proved to be a counterfeit. It was held that the plaintiff might recover the amount for which that bill was taken, the note so far not having been paid.

In *Cabot Bank v. Morton*, 4 Gray, 156, it was held that a person who procures notes to be discounted by a bank impliedly warrants the genuineness of the signatures.

Merriam v. Wolcott, 3 Allen, 258, recognizing the doctrine that an attempted payment in worthless paper is no payment, extends the same principle to sales, holding that the distinction raised in *Ellis v. Wild* and *Baxter v. Duren* is unsound and virtually overrules them. *Ellis v. Wild* has also been denied in *Bartsch v. Atwater*, 1 Conn. 409; see, also, Story on Notes, §§ 118, 119, 389; and Bigelow's Estoppel, 446-7; Redfield & Bigelow's L. & S. Cases, 669, and cases cited; 1 Chitty on Cont. (11th Am. ed.) 625, note; *Roberts v. Fisher*, 43 N. Y. 159; S. C., 3 Am. Rep. 680.

Thus from the weight of authority it would appear that the distinction noticed in *Ellis v. Wild* and *Baxter v. Duren* is, to say the least, somewhat shadowy, and that whether the plaintiff took the order as payment or as purchaser, the defendant must be held to some responsibility as to its validity; in short, that he, as seller, warrants the order to be what it purports, a genuine order; and whether that want of genuineness results from forgery or an absence of authority on the part of the drawers or acceptor, or, as in this case, both, must be immaterial. It was a town order the parties talked about; it was that which the defendant undertook to transfer, and that which the plaintiff agreed to receive. It turned out to be another thing, a mere form without the substance.

Hussey v. Sibley.

It is not the responsibility of the parties which the seller guarantees, but their liability.

But it is claimed that the order was not commercial paper, and that different principles of law must be applied to it. It is not strictly commercial, but *quasi* negotiable. *Emery v. Mariaville*, 56 Me. 315. But how does this help the defendant. It was still received in payment of an existing debt. If it was negotiable, the presumption would be that it was received in payment, and the burden would be upon the plaintiff to show some reason why it should not be allowed. On the other hand, not being negotiable, no such presumption prevails; and the burden is upon the defendant to show a special agreement to that effect. *Jose v. Baker*, 37 Me. 465. But so far as the agreement in this respect is concerned, the burden of proof is of no consequence. The facts are not in dispute, except as to the condition on which it was received; and we put the decision upon the ground that the order, having been delivered as an order in payment of an existing debt, and received in good faith as such, and subsequently proved to be invalid and worthless for any purpose whatever, fails to operate as a payment.

Upon the testimony as reported, we find no occasion to consider the question of estoppel raised by the defendant. Whether the defendant purchased the order relying upon the plaintiff's promise to take it involves a conflict of testimony. The defendant's wife testifies to such a promise. She is to some extent corroborated by other testimony in the case. This is as clearly denied by the plaintiff, and the case shows many circumstances which sustain him. The acts and declarations of the parties at the time the transfer was made, as proved by a decided preponderance of evidence, are so inconsistent with a prior agreement to take the order that we must consider the weight of evidence against it. The defendant was under a legal obligation to pay the money; and it is clear that the plaintiff did not want the order, but did want the money. The burden of proof upon this point is upon the defendant, and he fails to satisfy us that the plaintiff agreed to take the order except upon the condition that it would produce the money.

Judgment for the plaintiff.

HICHBORN V. FLETCHER.

(66 Me. 209.)

Sureties — contribution.

Plaintiff and defendant were sureties upon a promissory note which the maker failed to pay at maturity. Action thereon having been brought, plaintiff paid the note before judgment and brought this action for contribution. *Held*, that he was entitled to recover although there existed a good defense to the note, he being ignorant of the fact and having acted in good faith and without negligence.

ASSUMPSIT to recover contribution for money paid as surety.
The opinion states the case.

J. Williamson, for plaintiff.

W. H. McLellan, for defendant.

APPLETON, C. J. The parties to this suit signed as sureties for Wilson Randall a note of which the following is a copy :

“ \$530.

SEARSPORT, Aug. 9, 1868.

“ One year from date, for value received, we promise to pay to P. Simonton, or order, five hundred and thirty dollars, with interest.

“ WILSON RANDALL,

“ ROBERT HICHBORN,

“ C. S. FLETCHER, *Security*.”

If the defendant, having signed as surety, were *prima facie* to be regarded as surety for those whose signatures precede his own, still parol evidence is undoubtedly admissible to show his true relation to the note. In the present case it satisfactorily appears that both plaintiff and defendant were sureties for Wilson Randall.

The note having been sued and the plaintiff having paid the same before judgment, he now claims contribution of the defendant.

It is in proof that the payee of the note for a valuable consideration had given time to the principal. The plaintiff was a witness and testifies that when he paid the note he was ignorant of any such agreement, that the defendant had never informed him of its

Hichborn v. Fletcher

existence, and that he settled the suit in good faith, believing he was legally liable. The defendant was not a witness.

The question presented is, whether upon these facts he can recover his contributory share, of the defendant.

By becoming sureties, each impliedly promised the other that he would faithfully perform his part of the contract and pay his proportion of loss in case of the insolvency of the principal. *Crosby v. Wyatt*, 23 Me. 156; *Dole v. Warren*, 32 id. 94. The surety is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and non-payment of the contract for which he is a surety. When one or two persons, who, as surety for a third, signed, together with the principal, a joint and several promissory note, which he paid on its becoming due, though no demand had been made on him; upon an action brought against the maker, it was held that such payment could not be considered as voluntarily made, and that he might sue his co-surety for contribution. *Pitt v. Purssord*, 8 M. & W. 538. Much more, then, is not a payment voluntary, when the surety pays upon suit, and to avoid further costs; for the general rule is that a surety, who defends an action brought for money deficient, cannot claim contribution of his co-sureties for costs, unless he was authorized by them to defend. DeColyar on Guaranty, 348. Here, there was no authorization nor direction to defend; and, so far as the plaintiff and defendant knew, there was no existing defense which could be made. One surety may be discharged from his principal obligation, without discharging his co-sureties. In such case he will not be relieved from his liability to them for contribution. *Clapp v. Rice*, 15 Gray, 557; *Boardman v. Paige*, 11 N. H. 431. If a surety with a full knowledge of the facts, under a mistaken belief of liability, makes a payment when he is under no legal obligation, it is to be regarded as a voluntary payment for which he cannot claim contribution. *Bancroft v. Abbott*, 3 Allen, 524. But if in ignorance of the facts and in good faith he makes payment, when if all the facts were known he would not be liable, he can compel contribution, if he is guilty of no neglect in such want of knowledge. Without knowledge of the facts constituting a defense he could not defend. The defendant, though sued, gave no notice of any existing defense nor did he know of any. Both plaintiff and defendant, so far as they know, when sued were liable upon the note.

They were not required to wait for a judgment or the issuing of an execution. Either might make the payment and stop any additional expense. In *Warner v. Morrison*, 3 Allen, 566, it was held to be no defense to an action for contribution among co-sureties that the plaintiff, who paid the debt, did not avail himself of the defense of usury, if he was ignorant of the fact of such usury. It can, assuredly, make no difference in the legal rights of parties whether the defense is usury or delay given to the principal, if the surety is alike ignorant in either case of any existing defense, and without fault for such ignorance when the payment is made.

It is written of old, "be not surety above thy power; for if thou be surety, take care to pay it." The plaintiff testified that the defendant said "he wanted what was right in the premises." This is not contradicted. What is right is that the defendant should bear with the plaintiff his share of the burden they both assumed, and not that the plaintiff without fault should bear the whole.

Defendant defaulted.

LINDSAY V. HILL.

(66 Me. 212.)

Conflict of laws — usury.

A promissory note bearing lawful interest was made in New Brunswick and secured by mortgage on lands in Maine. After the note was due, illegal interest was exacted for forbearance of payment. By the law of New Brunswick usurious contracts were void and the lender forfeited both principal and interest, but in Maine, the rate of interest was not limited. In an action to foreclose the mortgage, *held*, that the mortgagor could not avoid the mortgage as it was valid in its inception; that the statute imposing a forfeiture of the principal and interest was in the nature of a penalty and of no effect outside of New Brunswick, and that the extra interest paid was not a set-off.*

ACTION to foreclose a mortgage. Plea, the general issue, with a brief statement that "the contract, to secure which the mortgage of the land described in the plaintiff's writ was given, was made at St. Stephen, New Brunswick, and by its terms there to be performed; that upon said contracts more than six per cent inter-

* See *Kilgore v. Dempsey*, 18 Am. Rep. 806; *Bowman v. Miller*, id. 688

Lindsay v. Hill.

est has been received by the plaintiff from the parties thereto, and their assignees, and that by the law of said province, at the time of said payments, the receiving of more than six per cent interest made said contracts utterly void."

It appeared in evidence that the rate of interest provided in the mortgage was lawful but that, after the money secured by the mortgage became due, the plaintiff exacted ten per cent interest on a gold basis for the forbearance of payment.

The defendant put in chapter 102 of the Revised Statutes of New Brunswick, Revision of 1854, which is admitted to have been the existing statute at the time the contract was made.

"I. No person shall, directly or indirectly, receive on any contract to be made for the loan of any money, or goods, more than six pounds for the forbearance of one hundred pounds for one year, and after that rate for a greater or less sum, and longer or shorter time ; and all deeds or contracts for the payment of any money to be lent, or for the performance of any thing undertaken, upon or by which more than such rate of interest shall be reserved or received, shall be utterly void.

II. Whoever shall upon any such deed or contract receive, by means of any fraudulent loan, bargain, exchange or transfer of any money or goods, or by any deceitful means for the forbearing or giving day of payment beyond a year, of his money or goods, more than six pounds for one hundred pounds for one year, and after that rate for a greater or less sum, and longer or shorter time, shall forfeit for every offense the value of the principal sum or goods, so loaned, bargained, exchanged or transferred, together with all interest and other profits accruing therefrom, one moiety to be paid to the Queen for the use of the province, and the other moiety to the person suing for the same, to be recovered by action in any court of record in the county where the offense may be committed, which action shall be brought within twelve months from the time of such offense."

E. B. Harvey, for plaintiff.

F. A. Pike & A. McNichol, for defendant.

DICKERSON, J. It is a rule of law, too well established to admit of controversy, that the nature, validity and construction of contracts are to be determined by the law of the place where the con-

tract is made, and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued. In the one case, the *lex loci contractus*, and in the other, the *lex fori*, governs. Foreign statutes of limitation come within the latter clause of this rule, because they affect only the time within which a legal remedy must be pursued, and not the gist of the contract itself. In the terse language of the court in *Andrews v. Pond*, 13 Pet. 65: "The legal consequences of an agreement must be decided by the law of the place where the contract was made; if void there, it is void everywhere." *Bulger v. Roche*, 11 Pick. 36, 37; *Duncomb et al. v. Bunker*, 2 Metc. 8, 10; *Gale v. Eastman*, 7 id. 14, 16.

The contracts secured by the mortgages were made in New Brunswick and to be executed there. The parties to the contracts, at the time they were made, resided there; and the payments were all made in that province. The security, though bargained for in New Brunswick, was necessarily executed in this State.

The statutes of New Brunswick, R. S., § 1, ch. 102, in force when the mortgages and contracts in controversy were executed, contained the following provision: "No person shall, directly or indirectly, receive on any contract to be made for the loan of any money or goods, more than six pounds for the forbearance of one hundred pounds for one year, and after that date for a greater or less sum, and longer or shorter time; and all deeds or contracts for the payment of any money to be lent, or for the performance of any thing undertaken, upon or by which more than such rate of interest shall be reserved or received, shall be utterly void."

Section second of the same statute imposes a forfeiture of the principal sum lent and all the interest, upon the lender for every offense against its provisions.

In order to render a contract void for usury, it must be tainted with that offense in its inception. It is the reservation or receipt of usurious interest in pursuance of the terms of the contract itself that renders it void; the subsequent payment of such interest upon a contract, free from the taint of usury in its origin, will not have this effect, 3 Parsons on Contracts, 115; *Nichols v. Fearson*, 7 Pet. 103; *Rice v. Welling*, 5 Wend. 595, 597; *Gardner v. Flagg*, 8 Mass. 101.

But the law is otherwise in respect to incurring the penalty or forfeiture for a violation of the law against usury. In that case,

Lindsay v. Hill.

the subsequent receipt of usurious interest by the lender, upon a contract originally untainted with usury, renders him liable to the penalty or forfeiture incurred. In *Floyer v. Edwards*, Camp. 112; Lord MANSFIELD said: "In case the agreement originally for the payment of principal be legal, and the interest does not exceed the legal rate, but afterward, upon payment being forborne, illegal interest is demanded, there the agreement by retrospect is not void but the parties are liable to the penalty of treble value." 3 Parsons on Contracts, 123; *Thompson v. Woodbridge*, 8 Mass. 256.

The instruments in controversy appear to have been given in the usual course of business, and upon their face are free from the taint of usury. The alleged usurious payments were made after the debts were overdue and the contracts were broken. The contracts, therefore, were not void under section 1, chap. 102, R. S. of New Brunswick, but the forfeiture imposed by section 2, of the same chapter, was incurred by the defendants. That forfeiture is in the nature of a remedy, which, as we have seen, can extend only to suits brought in New Brunswick, and can have no effect where a remedy is sought under our laws; in other words, the defendant, in this respect, cannot invoke the same defense in this State, that he could make in New Brunswick. *Gale v. Eastman*, *supra*; *Dunscomb et al. v. Bunker*, *supra*.

The case is, therefore, to be determined by the law of the forum selected by the plaintiff for the enforcement of her rights. Can the defendant here avail herself by way of recoupment, set-off, or otherwise, of the excess paid over six per cent upon the contracts in controversy?

When the alleged usurious payments were made, our statute provided that in an action brought to recover the principal and interest, in such a case, the usurious interest might be deducted from the principal. But that statute was repealed in 1870, and, instead of it, the present statute was enacted, which simply provides that "In the absence of any agreement in writing, the legal rate of interest shall be six per cent per annum."

It is argued by the learned counsel for the defendant, that an action for money had and received lies to recover back the amount of usurious interest paid, and that to avoid circuity of action, that sum may be allowed the defendant, in extinguishment of her original indebtedness, as it exceeds that amount. The authorities indicate that, where a usurious contract is declared illegal and void by

statute, the money paid thereon is to be regarded as taken illegally, and as oppressively extorted from the borrower, and that, therefore, the equitable action for money had and received lies to recover it back. It is upon this ground that the authorities, relied upon to support the defendant's theory, rest. This question is discussed by SHAW, C. J., in *Crosby v. Bennett*, 7 Metc. 17, 18; and the distinction is expressly made between usurious contracts that are made illegal and void by statute, and those that are not, giving the equitable action for money had and received to recover back the usurious interest paid in the former case, and denying it in the latter. We think this distinction is well taken. Where the law does not prohibit usury, nor make usurious contracts illegal or void, it cannot regard the taking of a greater sum for the use of money than is fixed by the law as illegal or oppressive, which is the gist of the right of recovery invoked by the defendant. It is only upon the ground that the payments made by her grantors were received in violation of law that she claims the right to recoup: if no law has been violated, there is no right of recoupment.

While our statute fixes the legal rate of interest at six per cent, per annum, it does not in terms nor by necessary implication prohibit the taking of a greater sum, nor declare contracts for a greater rate illegal or void. Nor does it provide for the deduction of the amount of interest paid in excess of this rate from the principal upon action brought therefor, or for its recovery back where there is "no agreement in writing" in respect to interest. It simply declares what shall be the legal rate of interest when there is no agreement in writing for a different rate.

This construction of the statute harmonizes with the action of the legislature upon this subject. Contemporaneously with the enactment of the present statute, the legislature passed an act repealing the usury act of 1857, which contained the identical provisions for the deduction from the principal, and the recovery back, of usurious interest, where paid, that are now sought to be applied in this case. That act of repeal was a legislative construction of the existing statute. By its repeal of the act of 1857, and its omission to incorporate the provisions contended for by the defendants into the new statute, the legislature clearly intended to effect a radical change in the law of usury. It would be an alarming exercise of judicial power of construction to hold that the law is the same upon the subject under consideration as it was

State v. Haynes.

before the statute of 1857 was repealed. Such a construction would render the repealing act nugatory. Language could scarcely make the intention of the legislature to abolish the remedies provided in the statute of 1857 more intelligible. This court cannot undertake to revive by construction a doctrine which the legislature obviously intended to discard by positive enactment. Our conclusion is that the defendants are not entitled to have the amount of usurious interest, paid by them, deducted from the contracts secured by the mortgages in suit.

Judgment for plaintiff.

STATE V. HAYNES.

(66 Me. 207.)

Arson — liability of servant who burns his master's house by procurement of master.

A servant who sets fire to his master's house by his master's procurement for the purpose of defrauding the insurers is not guilty of arson either at common law or under a statute making it arson to burn the dwelling-house of another.

INDICTMENT for arson under a statute (R. S., ch. 119, § 1) set forth in the opinion. The defendant was a servant of Mrs. Ingraham. The material facts appear in the opinion. The verdict was guilty; and the defendant alleged exceptions.

D. N. Mortland, for defendant.

L. A. Emery, attorney-general, for State.

APPLETON, C. J. This is an indictment for arson, under R. S., ch. 119, § 1, for feloniously, willfully and maliciously burning, in the night time, the dwelling-house of Eleanor R. Ingraham.

The evidence tended to prove, and the jury must have found, that the dwelling-house of Mrs. Ingraham was burned in the night, under the following circumstances: The house was insured by Mrs. Ingraham. Being insured, Mrs. Ingraham, her daughter,

and the defendant conspired together to burn the house, for the purpose of obtaining the insurance. In pursuance of that object, Mrs. Ingraham left her house on a visit. The daughter was away and out at service. The house was prepared for burning by the removal of the furniture, and the defendant was left to set the fire. All these facts were admitted by the parties implicated, with a praiseworthy candor, and an apparent unconsciousness of any great moral turpitude in defrauding an insurance company, except the fact of burning by the defendant, which he denied, but which it is apparent by their verdict the jury must have found.

The question presented for determination is whether, upon the facts, the indictment can be sustained under R. S., ch. 119, § 1, which is in these words : "Whoever willfully and maliciously sets fire to the dwelling-house of another, or to any building adjoining thereto, or to any building owned by himself or another, with the intent to burn such dwelling-house, and it is thereby burned, in the night time, shall be punished with death."

Arson, by the common law, is an offense against the security of the dwelling-house. The felony of arson or willful burning of houses is described by my Lord COKE, cap. 15, p. 66, to be "the malicious and voluntary burning the house of another, by night or by day." 1 Hale's P. C. 566. Our statute in section 1 makes the offense capital only when the burning is in the night, and there is some person lawfully in the dwelling-house at the time. But the dwelling-house burned must be the dwelling-house of another.

In some States the common law has been modified, as in New York, where the willfully setting fire to, or burning any inhabited dwelling in the night time, is made arson, so that the offense may be committed by one's burning his own dwelling-house. So in England the British Parliament has so modified the law in relation to arson, as to render it immaterial whether the house burned be that of the offender himself, or of a third person. *Shepherd v. The People*, 19 N. Y. 537; Stat. 1 Vict., ch. 89, § 3; *Rex v. Ball*, 1 Moo. C. C. 30.

The house burned by the defendant was the house of another. If Mrs. Ingraham had burned her own dwelling, she would not have been amenable to the penalties prescribed by section 1. The fire was set at her instance, and for her supposed benefit. The servant obeying cannot be more guilty than the master commanding. The precise question before us arose in Tennessee (*Roberts v. State*, 7 Cold. 359), and it was there held, that it was not arson to procure

Bird v. Munroe.

one's own house to be burned, and that the guilt of the agent was only co-extensive with the guilt of the principal. It is not arson for a man to burn his own house, or to procure it to be done, for the purpose of defrauding an insurance company. Nor is the agent, by whom it is done, guilty of a greater offense than his principal. "An agent," says HAWKINS, J., in the case last cited, "who commits an act, can, upon general principles, be guilty of no higher nor greater offense than the principal would have been had he committed the act himself."

The ruling of the presiding justice was adverse to the views above expressed, and was erroneous.

It becomes, therefore, unnecessary to consider the other questions raised by the exceptions.

Exceptions sustained.

BIRD v. MUNROE.

(66 Me. 337.)

Statute of frauds — execution of memorandum after breach.

A written memorandum of a verbal contract was made after a breach of the contract, but before action for the breach. It was antedated as an original contract of the date of the verbal contract first made. *Held*, that the memorandum was sufficient to satisfy the statute of frauds.

ASSUMPSIT on a contract substantially as stated in the following writing signed by the parties, and read in evidence by the plaintiffs.

"ROCKLAND, March 2, 1874.

"Memorandum contract by and between H. H. Munroe, of Thomaston, of the first part, and John Bird & Co., of Rockland, of the second part. The party of the first part agrees to pay the party of the second part four dollars per ton gross (2,240 lbs.) for five thousand tons of ice, weighed on board, price to include ice and freight to New York. The said party of the second part agrees to deliver said ice on following conditions: Shipments to begin immediately, and to continue until full amount is shipped, cash to be paid on delivery of each cargo. Vessels to be discharged with dispatch;

Bird v. Munroe.

demurrage, if any, to be paid by party of first part, and no commissions to be paid on sales.

“ H. H. MUNROE.

“ JOHN BIRD & Co.

“ Attest : EDMUND A. SMITH.”

The declaration averred a breach of the contract by the defendant, in ordering a stoppage of shipments after one-half of the quantity contracted for had been shipped ; and the plaintiffs claimed for extra expenses by reason hereof itemized in the following account annexed to the writ :

April 7, 1874.	To expense housing 2500 tons ice at 25c.,	\$625 00
	“ breaking out & loading same,	625 00
	“ building houses for same,....	600 00
	expense in hauling same,	250 00
	shrinkage and waste, (500 tons)	375 00
	expenses at New York and telegrams,	125 00
		<hr/>
		\$2,600 00
		<hr/>

The defendant pleaded the general issue with a brief statement, “that the said supposed contract set forth and declared upon in the plaintiffs’ writ, as having been made between the plaintiffs and defendant, on the said 2d day of March, A. D. 1874, was not in writing, nor was there any written memorandum thereof ever made by either of the parties to this action, or by their agents, nor was there ever any delivery of the said ice, or any part thereof, by the plaintiffs to defendant, nor any acceptance or reception of the same, or any part thereof, by the defendant ; nor did the defendant ever pay to the plaintiffs any thing in earnest to bind the bargain, or in part payment for said ice, and that said contract, if any such contract was ever made, was void by force of the statute of frauds.

And that the said supposed contract in the declaration set forth, if any such was ever legally made, was on the 24th day of March, 1874, abandoned and canceled by the mutual consent of the parties, and all breaches thereof waived and satisfied, by the said cancellation and abandonment, and that the plaintiffs did not deliver the said ice to the defendant, but sold and delivered it to the Knickerbocker Ice Co., of New York, and received payment therefor, from said Ice Co.”

Bird v. Munroe.

The evidence tended to show that after one-half of the ice had been shipped, the defendant ordered further shipments on his account to cease; that none of the ice was in fact received by him; that March 24, 1874, the parties met in New York, and then and there reduced to writing, the memorandum in evidence dated March 2, 1874; that the plaintiffs contracted on the same day to sell all the ice to the Knickerbocker Ice Co., the twenty-five hundred tons afloat at \$4.00 per ton, and the twenty-five hundred tons in house at \$4.25, including freights, the twenty-five cents per ton added, to be paid to S. H. Allen.

On this contract was the following indorsement signed by the defendant and witnessed :

“It is understood that the within five thousand tons (5,000) of ice is the same that was contracted for on March 2, 1874, with H. H. Munroe, and I, H. H. Munroe, hereby consent to the assignment of the same to the Knickerbocker Ice Company

NEW YORK, *March 24, 1874.*”

After the foregoing and other evidence, which in the opinion sufficiently appears, was introduced, the action was made law on report, to stand for trial if maintainable upon so much of the evidence as was legally admissible, otherwise the plaintiffs to be nonsuit.

A. S. Rice & O. G. Hall, for plaintiffs.

A. P. Gould & J. E. Moore, for defendant, contended that the allegation based upon the written contract was not supported by proof; that the evidence of the verbal contract, such as it was, even if legally admissible, did not support the declaration, and that it was not legally admissible, because of the statute of frauds; that the memorandum in evidence was a written contract in itself, and not intended as a memorandum of a previous verbal contract; that a verbal offer subsequently reduced to writing in the form of a contract, and signed by the parties, or even by the party making it, could not be treated as a memorandum of a verbal offer or agreement (*Washington Ice Co. v. Webster*, 62 Me. 341); that the verbal contract, if any existed, covered only one or two of the many elements of the written contract; that the contract dated March 2, and written, executed and delivered March 24, could have no validity before the latter date; that the written contract

took its force and effect from the day of its execution and delivery and not from the day of its date (*Hall v. Cazenove*, 4 East, 477; *Joseph v. Bigelow*, 4 Cush. 82; *Jackson v. Schoonmaker*, 2 Johns. 230); that if the instrument had no validity as a sale prior to March 24, it had validity for no purpose prior to that time. *Egery v. Woodard*, 56 Me. 45.

PETERS, J. On March 2, 1874, at Rockland, in this State, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, ante-dating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24), by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts, and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and ante-dated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evi-

Bird v. Munroe.

dence is considered together. We think the writing made on the 24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract, and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the *res gestæ*. Benjamin on Sales, § 213; *Stoops v. Smith*, 100 Mass. 63, 66; S. C., 1 Am. Rep. 85, and cases there cited.

Then, the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first-named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date (March 2), although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part

of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterward. It also implies that no set and formal agreement is called for. Chancellor KENT says: "The instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this State, the consideration for the promise is not required to be expressed in writing. *Gillighan v. Boardman*, 29 Me. 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserve all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the

Bird v. Munroe.

statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented ; but, as said by BIGELOW, J., (3 Gray, 331): "A memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The *locus penitentiæ* remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps, most instances, such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is *per se* the contract of the parties. In many cases, as for instance, like the ante-dating of the deed in *Egery v. Woodard*, 56 Me. 45, cited by the defendant, the contract (by deed) could not take effect before delivery ; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S., ch. 111, § 4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained ;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good ;" and the change was made when the statutes were revised in 1857, without any legislative attempt to make

an alteration in the sense of the section. (R. S. 1841, ch. 136, § 4.) The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Brown on Stat. of Frauds, §§ 115, 136, and notes to the sections; Benjamin on Sales, § 114; *Townsend v. Hargraves*, 118 Mass. 325, and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of *Townsend v. Hargraves*, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract, and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. *Vincent v. Germond*, 11 Johns. 283, is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. *Webster v. Zielly*, 52 Barb. 482, in the argument of the court, directly admits the same principle. The case of *Leather Cloth Co. v. Hieronimus*, L. R., 10 Q. B. 140, seems also to be an authority directly in point. *Thompson v. Alger*, 12 Metc. 428, 435, and *Marsh v. Hyde*, 3 Gray, 331, relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expressions in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication. Such as, that the statute does not apply where the contract has been executed on both sides (*Bucknam v. Nash*, 12 Me. 474); that no person can take advantage of the statute but the parties to the contract, and their privies (*Cowan v. Adams*, 10 Me. 374); that the memorandum may be made by a broker (*Hinckley v. Arey*, 27

Bird v. Munroe.

Me. 362); or by an auctioneer (*Cleaves v. Foss*, 4 Me. 1); that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale (*Davis v. Moore*, 13 Me. 424); or several days after (*Bush v. Holmes*, 53 Me. 417); or ever so long after; (Brown on Stat. of Frauds, § 337, and cases there noted); that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained (*Haynes v. Nice*, 100 Mass. 327); that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract (*Leroux v. Brown*, 12 C. B. 801); but this case has been questioned somewhat; that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received (*Howard v. Sexton*, 4 Comst. 157); that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterward (*Maclean v. Dunn*, 4 Bing. 722); that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed (*Gale v. Nixon*, 6 Cow. 445); that the recognition of the contract may be contained in a letter; or in several letters, if so connected by "written links" as to form sufficient evidence of the contract; that the letters may be addressed to a third person (Browne on Stat. of Frauds, § 346; *Fyson v. Kitton*, 30 E. L. & Eq. 374; *Gibson v. Holland*, L. R., 1 C. P. 1); that an agent may write his own name instead of that of his principal if intending to bind his principal by it (*Williams v. Bacon*, 2 Gray, 387, 393, and citations there); that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum (*Reuss v. Picksley*, L. R., 1 Exch. 342); that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed (*Dobell v. Hutchinson*, 3 A. & E. 355); that the written contract may be rescinded by parol, although many decisions are opposed to this proposition (*Richardson v. Cooper*, 25 Me. 450); that equity will interfere to prevent a party making the statute an instrument of fraud (*Ryan v. Dox*, 34 N. Y. 307;

Hassam v. Barrett, 115 Mass. 256, 258); that a contract verbally made may be maintained for certain purposes, notwithstanding the statute; that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused (*Chapman v. Rich*, 63 Me. 588, and cases cited); that a respondent in equity waives the statute as a defense unless set up in plea or answer (*Adams v. Patrick*, 30 Vt. 516); that it must be specially pleaded in an action at law (*Middlesex Co. v. Osgood*, 4 Gray, 447; *Lawrence v. Chase*, 54 Me. 196); that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it. Browne on Stat. of Frauds, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defense of the statute under the general issue. The different rule in Massachusetts and Maine grew out of the practice act in the one State and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in *Thornton v. Kempster*, 5 Taunt. 786, 788, "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, JERVIS, C. J., said "the effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of *McClellan v. McClellan*, 65 Me. 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. WILLES, J., perhaps correctly describes it in *Gibson v. Holland*, *supra*, when he says, "the memorandum is in some way to stand in the place of a

Holbrook v. Tobey.

contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." Browne on Stat. of Frauds, § 338; Benjamin on Sales, § 159; *Fricker v. Thomson*, 1 Man. & Gr. 772; *Bradford v. Spyker*, 32 Ala. 134; *Bill v. Bament*, 9 M. & W. 36; *Philbrook v. Belknap*, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

HOLBROOK v. TOBEY.

(88 Me. 410.)

Damages — for breach of contract in restraint of trade

Where one binds himself in a sum certain not to carry on, or to allow to be carried on, any particular kind of business, within certain territory, or within a certain time named, the sum mentioned will, as a rule, be regarded as liquidated damages, and not as a penalty.

ASSUMPSIT on the following contract: "Be it known that for a valuable consideration, paid by Warren Holbrook, of Bingham, I hereby bind myself to said Holbrook, in the sum of five hundred dollars, to close up my house, as a public house, for the term of five years, meaning that the stables, nor the house shall not be used for the entertainment of the traveling public, for the next five years.

"A. P. TOBEY."

"BINGHAM, May 25, 1872."

The plaintiff introduced evidence tending to prove that the house and stables referred to in the contract had, previous to the date thereof, been occupied by the defendant, as a tavern and place of public entertainment; that the plaintiff also kept a tavern in the same village, and that the defendant, having sold his house and stables, they were re-opened by the defendant's grantees, as a tavern, on the tenth day of August, 1873, and ever since kept as a tavern. The plaintiff claimed he was entitled to judgment

Holbrook v. Tobey.

that for the five hundred dollars named in the contract as liquidated damages. The defendant, on the contrary, contended that the sum named in the contract should be treated as a penalty, and the damages assessed by the jury.

The case was then by consent withdrawn from the jury, and reported to the full court. If the five hundred dollars named in the contract should be considered as liquidated damages, judgment to be rendered for plaintiff for that sum, otherwise the case to stand for trial, and the damages to be assessed by the jury.

S. J. Walton & L. L. Walton, for plaintiff. The \$500 named in the contract should be regarded as liquidated damages, because unaccompanied by any statement that the parties regarded it as penal. *Gammon v. Howe*, 14 Me. 250, 254. Even if the term "penalty" had been used, that of itself would not have been conclusive. Pars. on Cont., vol. 3, ch. 8, § 2, *Dwinel v. Brown*, 54 Me. 468, and opinion near close of p. 471, and opinion p. 475; *Chase v. Allen*, 13 Gray, 42, 45; *Hodges v. King*, 7 Metc. 583, 586.

The parties intended to fix the amount of the damages, on account of the difficulty, if not impossibility, of ascertaining and computing them. Pars. on Cont., vol. 3, ch. 8, § 2.

The sum fixed is reasonable; and the case does not come under any one of the exceptions, where the sum named has been regarded by the court as a penalty.

S. D. Lindsey, for defendant. The primary undertaking of the defendant was not to pay money, but to close his house; and the sum specified is collateral.

It is not named as damages.

Forfeitures are not favored. If possible, the court will treat the sum as a penalty, and permit the defendant to show actual damages.

To hold the damages liquidated might lead to inequitable results. Suppose he opened his house but for a single day, near the close of the term.

There neither exists in this case the express stipulation that the \$500 should be considered liquidated, nor is the nature of the contract such that the damages may not be satisfactorily ascertained. *Shute v. Taylor*, 5 Metc. 61; *Stearns v. Barrett*, 1 Pick. 443; *Merrill v. Merrill*, 15 Mass. 488; *Lawrence v. Parker*, 1 id. 191; *Hig-*

Holbrook v. Tobey.

ginson v. Weld, 14 Gray, 165; *Fish v. Gray*, 11 Allen, 133; 2 Greenl. Ev., § 258.

WALTON, J. The defendant bound himself in the sum of \$500, to close his house as a public house, and not to allow his house or his stables to be used for the accommodation of the traveling public for the next five years; and the only question is whether the sum mentioned shall be considered as liquidated damages or a penalty.

We think it must be regarded as liquidated damages. The authorities run in nearly an unbroken current to the effect that where a party binds himself in a sum named not to carry on any particular trade, business, or profession, within certain limits, or within a specified period of time, the sum mentioned will be regarded as liquidated damages, and not a penalty.

In *Leighton v. Wales*, 3 Mees. & W. 545, where the defendant bound himself not to run a coach over a certain road, at any time within one hour before or after certain specified hours of the day, under a penalty of £40, *held*, that the £40 must be construed as liquidated damages, and not as a penalty.

In *Crisdee v. Bolton*, 3 Carr. & P. 240, where, in an agreement for the sale of a public house, the seller agreed not to be concerned in carrying on the business of a publican within a mile of the house he had sold, under the penal sum of £500, it was held that the whole sum was recoverable as stipulated damages.

In *Rawlinson v. Clarke*, 14 Mees. & W. 187, where an apothecary sold out his business, and agreed not to carry on the business within three miles of the then place of business, and for a breach of the agreement, to pay £500, it was held that the measure of damages was the full sum named.

In *Price v. Green*, 16 M. & W. 346, where the defendant bound himself in the sum of £5,000, not to engage in the business of a perfumer in London or Westminster, it was held that for a breach of the agreement the plaintiff was entitled to recover the whole sum of £5,000.

In *Galsworthy v. Strutt*, 1 Exch. 659, where an attorney agreed that he would not within the next seven years engage, directly nor indirectly, in the business of an attorney or solicitor, within fifty miles of a place named, and, if he should violate his agreement,

that he would pay the plaintiff £1,000, it was held that the sum named must be considered liquidated damages, and not a penalty.

In *Sainter v. Ferguson*, 7 C. B. 716, where a surgeon agreed that he would not practice within seven miles of a place named, under a penalty of £500, it was held that the £500 was not a penalty, but liquidated damages.

In *Atkyns v. Kinnier*, 4 Exch. 776, where a surgeon agreed that he would not practice within certain limits named, and, for a breach of the agreement, would pay £1,000, it was held that the £1,000 was liquidated damages, and not a penalty.

In *Pierce v. Fuller*, 8 Mass. 223, where the defendant agreed not to run a stage on a certain road, under the penalty of \$290, it was held that the sum named must be regarded as liquidated damages.

In *Dakin v. Williams*, 17 Wend. 447; S. C., 22 Wend. 201, where the defendant sold a newspaper establishment, and bound himself in the sum of \$3,000, not to publish a rival paper, the sum named was held to be liquidated damages.

In *Mott v. Mott*, 11 Barb. 127, where the defendant bound himself in the sum of \$500 not to practice medicine within a certain town named, for five years, it was held that the \$500 must be regarded as liquidated damages, and not as a penalty. In this case the court recognize the principle that where a certain sum has been agreed upon as damages for the violation of an agreement restraining a party from the use of a trade or profession, the sum named will, in general, be considered as liquidated damages.

In *Streeter v. Rush*, 25 Cal. 67, a butcher sold out, and bound himself in the sum of \$400 not to go into business again in the same place, without the plaintiff's consent; and in *Duffy v. Shocky*, 11 Ind. 70, the defendant agreed not to have a marble shop within certain territory under a penalty named; and in *Gresselli v. Lowden*, 11 Ohio St. 349, that he would not work a laboratory, claimed to be a nuisance to the plaintiff's premises, and if he did, to pay \$3,000; and in *Jaquith v. Hudson*, 5 Mich. 123, a retiring partner agreed to forfeit \$1,000 if he went into business again in the same place within a certain time; and in *Cushing v. Drew*, 97 Mass. 445, the defendant sold out an express business, and agreed not to engage in the same business again in the same place, so long as the

Goss v. Coffin.

plaintiff should continue in it; and in all these cases the sums named were held to be liquidated damages, and not penalties.

We think the case now before us falls clearly within the principle of these decisions, namely, that where a party binds himself in a sum certain not to carry on, or allow to be carried on, any particular kind of business, within certain territory, or within a certain time named, the sum mentioned will, in general, be regarded as liquidated damages, and not as a penalty. Of course, if the sum named should be out of all proportion to any possible damage which the plaintiff could sustain, the court would hold otherwise, upon the very reasonable presumption that the parties never could have intended that the sum named should be regarded as liquidated damages. But in all ordinary cases, where there is no such disproportion, we think the sum agreed upon should be the amount recoverable. In this case there is no such disproportion, and our conclusion is that the defendant must abide by the agreement which he thought proper to make.

Judgment for plaintiff for \$500.

GOSS V. COFFIN.

(93 Me. 432.)

Bankruptcy — title of assignee.

An assignee in bankruptcy, in the absence of fraud, takes no title to land of the bankrupt as against a grantee of the bankrupt by deed made before bankruptcy, although the deed is not recorded, and the receiver had no notice of it.

TRESPASS for taking and carrying away hay from lands in Bethel. Both parties claimed right to possession of the land through one Goss; the plaintiff by a life lease, dated March 24, 1859, and reciting that it was "in consideration of a deed of the farm of the same date from Thomas Goss, and that all crops of hay therefrom are at all times the sole property of the said Thomas Goss during his natural life." In consideration of the same deed, Daniel M. Goss gave a bond of the date of the lease, for the maintenance of Thomas Goss.

The defendant claimed directly from Josiah A. Bucknam, who took possession of the farm, as assignee in bankruptcy of Daniel M. Goss, as a part of his effects mentioned in the schedule by him in the proceedings in bankruptcy.

There was evidence showing that Bucknam had no knowledge of the existence of the lease from Daniel M. Goss to Thomas Goss, until after he sold the hay to Coffin, the defendant.

The defendant at the trial contended, as the lease from Daniel M. Goss to Thomas Goss had never been recorded, and the deed from Thomas to Daniel was recorded in the registry, December 20, 1859, and as the record showed the title to be in Daniel, when the petition in bankruptcy was filed against him by his creditors, May 14, 1874, that the lease was not valid against Bucknam, nor against the defendant who purchased the hay of Bucknam. He further contended that the lease was not in fact executed at the time of its date, but was, after the proceedings in bankruptcy, and in fraud of the creditors of Daniel M. Goss.

The presiding justice, among other things, instructed the jury, that if the plaintiff's lease was executed before the bankruptcy of Daniel M. Goss, and was free from fraud, it gave to the plaintiff a better title than that of Bucknam, under whom the defendant claimed, and he was legally entitled to the possession of the farm, and the growing grass, and to recover for the hay in suit; but if the lease was not executed till after the bankruptcy, or was fraudulent as against the creditors of Goss, Bucknam, his assignee, had a legal right to enter and dispossess the plaintiff, and cut the grass, and the action could not be maintained against the defendant who held under him.

The verdict was for the plaintiff for \$55; and the defendant alleged exceptions.

T. B. Swan, for defendant.

David Dann, for plaintiff.

VIRGIN, J. The defendant contended before the jury that the lease was in fact executed after the proceedings in bankruptcy, and in fraud of the creditors of the bankrupt. The presiding justice instructed the jury "that if it were executed after the bankruptcy of the bankrupt, or it were fraudulent as to his creditors, this action could not be maintained; but if it was executed before the

Goss v Coffin

bankruptcy, and was free from fraud, it gave to the plaintiff a better title than that of the assignee under whom the defendant claims, and that he was entitled to the possession of the farm, and to recover for the hay in this suit."

Under these instructions, the jury returned a verdict for the plaintiff, for the value of the hay ; and, therefore, they must have found that the lease was executed prior to the bankruptcy, and was free from fraud as to the creditors of the bankrupt. With the verdict so far as it is based upon the decision of these facts, the defendant finds no fault, and, therefore, has filed no motion to set it aside as being against the weight of evidence. He contends, however, that the instructions were erroneous when considered in connection with the two facts, that the lease was not recorded, and that the assignee had no knowledge of its existence, until after the hay was sold to the defendant ; and he urges upon us, in substance, the proposition applicable to an attaching creditor or to a purchaser for a valuable consideration, to wit, that when D. M. Goss was declared a bankrupt and his property assigned, the record showed the title of the farm to be in the bankrupt ; and the assignee having no knowledge of the existence of the lease, it could not be valid against the assignee by reason of the provisions of R. S., ch. 73, § 8.

Assuming that this lease is such an instrument as is mentioned in the statute cited, and that, therefore, it is not "effectual against any person except the grantor, his heirs and devisees, and persons having actual knowledge thereof, unless recorded," still the proposition of the defendant cannot be sustained, for by the terms of the statute, the lease would be valid against the grantor, and the assignee in this case stands in the place of the grantor. Or, in other words, an assignee in bankruptcy takes only such rights and interests as the bankrupt himself had and could assert, at the time of his bankruptcy, except in case of fraud ; and the jury has decided that the case at bar is not within the exception.

Such was the well-established doctrine under the bankrupt act of 1841. *Kittridge v. McLaughlin*, 33 Me. 327 ; *Winsor v. McLellan*, 2 Story, 492. And the same doctrine has been sustained under the act of 1867, by Mr. Justice SHEPLEY, in an elaborate opinion, in which he decides that a chattel mortgage valid between the parties, and not fraudulent under the bankrupt act, is good against the assignee or trustee of the mortgagor in bankruptcy, although not recorded as required by the statute of the State in

Cragin v. Cragin.

which it is made. *Coggeshall v. Potter*, 1 Holmes (U. S. C. C., 1st C.), 75, and cases there cited. In cases where unrecorded mortgages are declared to be fraudulent and void as against creditors, another rule is applicable. *Second Nat. Bank v. Hunt*, 11 Wall. 391.

Had the assignee received full title to the farm, he would have been entitled to the crops. But as the lease was valid as against the assignee, he had no right to enter, dispossess the plaintiff, harvest the hay and sell it to defendant; and by doing so, he became a trespasser. Having himself no title to the hay, he could give none to the defendant. *Exceptions overruled.*

CRAGIN V. CRAGIN.

(66 Me. 517.)

Life insurance — "for benefit of wife and children" — distribution of proceeds.

A man procured a policy of insurance on his life "for the benefit of his wife and children," and payable "to the said assured, their executors," etc. *Held*, that the money assured was to be distributed among the beneficiaries equally, and not according to the statute of distribution.*

ASSUMPSIT by the widow of John Cragin against one of his sons to recover her share of the sum of \$2,358, the proceeds of a policy of insurance on the life of said John Cragin, collected by the defendant under a power of attorney.

The opinion states the essential facts.

S. H. Lowell, for plaintiff.

E. F. Pillsbury, for defendant.

DANFORTH, J. John Cragin in his life-time procured a policy of insurance upon his life "for the benefit of his wife and children." It was made payable "to the said assured, their executors, admin-

*See *Bailey v. New Eng. Ins. Co.* (114 Mass. 177), 19 Am. Rep. 330, and the note thereto. In that case a policy on a man's life for the benefit of his widow, promised to pay the sum assured to the said assured, his executors, etc., and it was held that an action on the policy must be brought by the executor or administrator of the husband, and not by the beneficiary, his widow. On the other hand, in *Davenport v. Mutual Life Ins. Co.*, 47 Vt. 523, given in 19 Am. Rep. 331, note, the policy promised to pay the wife and children, and the court held that the administrator of the insured could not sue. See other cases in note, 19 Am. Rep. 331.

Cragin v. Cragin.

istrators or assigns, or guardian of children under age." The said Cragin died intestate, leaving a widow and ten children. After his death the defendant collected the amount due on the policy, by virtue of a power of attorney from the widow and children. The widow now brings this action to recover her share of the proceeds of the policy; and the amount of that share is the only question in controversy. She claims one-third of the whole amount by virtue of R. S., ch. 75, § 10. But that section refers only to the distribution of money received on a life policy belonging to the estate. If this money were the property of the estate it could legally have been collected only by the administrator, and must necessarily have been distributed through the Probate Court. In such a case the plaintiff's remedy would not be by action, but only by process in that court, or perhaps in case of neglect of duty by the administrator, by action upon his bond. It is very clear that in an action of this kind she cannot avail herself of any rights which she might have under the statute in cases to which it is applicable. These principles were settled upon satisfactory reasons in *Lee v. Chase*, 58 Me. 432.

It follows that whatever rights the plaintiff may have in this case depends upon the construction to be given to the policy. That, as already seen, was obtained not only for the benefit of the wife and children, but was made payable to them. It could not have been collected in the name of the administrator, nor could its proceeds have been assets of the estate for distribution or otherwise. They were the property of the widow and children, not by descent, but by virtue of the contract. Had there been in the policy a provision for an unequal distribution of the proceeds among the payees, it would have been binding; and each would have received the share so provided. But in this policy there is no such provision, or any indication of intention in that respect, other than the general expression, "payable to the assured," etc. In the absence of such provision all must share alike. *Gould v. Emerson*, 99 Mass. 154, 156, 157.

The defendant, as the case finds, having collected the money by virtue of a power of attorney from the beneficiaries, holds the plaintiff's one-eleventh as money received for her use, and is liable for it in this action. The amount as agreed by the parties is \$213.73.

Judgment for the plaintiff.

ASBURY LIFE INSURANCE COMPANY V. WARREN.

(66 Me. 523.)

Evidence — representations of insured as to health, in action to recover back money paid on a life insurance policy. Juror — what expression of opinion disqualifies.

In an action to recover back money paid on a policy alleged to have been procured by the defendant on the life of one in feeble health, by means of fraud and deceit, *held*, that statements and complaints of the person insured, such as usually and naturally accompany and furnish evidence of a present existing pain or malady, were admissible in evidence; but that statements and representations of past feelings or bodily condition were not admissible. A person who has expressed an opinion that one undergoing imprisonment for a criminal offense has been sufficiently punished, and who has signed a petition for his pardon, is not a competent juror upon the trial of a civil action against the prisoner founded upon the same charge.

ACTION on the case against Warren and two others to recover back money obtained from the plaintiff by reason of the fraudulent conspiracy of the defendants.

It appeared that on October 3, 1873, the plaintiff issued a policy of insurance upon the life of Serecta Anna Warren, sister of one of the defendants, for the sum of \$3,000, payable to the defendant, Warren. The insured died of pulmonary consumption, December 28, 1873, and the money assured was paid to Dr. Warren, one of the defendants, and was in part divided by him between the other defendants.

The application for the policy purported to have been signed by both Dr. Warren and his sister, the insured; but the evidence showed that Dr. Warren signed his sister's name, and that one of the other defendants witnessed it.

The plaintiff introduced evidence tending to show that Miss Warren, the insured, had been ill during the summer and autumn of 1873, and to prove the fact, it offered one Abby Howes, her intimate friend, to testify to declarations made by Miss Warren about her health and maladies, to Miss Warren at the time she was laboring under and suffering from the same; also offered two letters written by Miss Warren to Miss Howes, one dated September 15, 1873, and one dated October 14, 1873, and received by Miss Howes, by due course of mail, in which were statements con-

Asbury Life Insurance Company v. Warren.

cerning her health, physical condition and maladies under which she was then and there laboring ; also offered to prove by Betsey Churchill, who was the nurse and attending upon said Serecta Anna during the last ten hours of her life, her declarations during that time and after she was conscious that she could live but a short time, concerning the cause of her then present sufferings and the length of time they had existed, all of which evidence was excluded by the presiding justice. The verdict was for the defendants, and the plaintiffs alleged exceptions.

They also filed a motion to set the verdict aside as against law, evidence and its weight, and because of the disqualification of a juror.

The facts bearing upon the motion are that at the September term of the court, 1874, for Franklin county, an indictment was found against the same defendants for the same conspiracy, and Warren and Curtis were tried thereon at the March term thereafter, found guilty and sentenced to imprisonment, the defendant, Fenderson, in the meantime having died. After Warren and Curtis were sentenced, petitions for the executive pardon of Curtis were circulated and numerous signed in Franklin county, of the form following :

“To his excellency the Hon. Nelson Dingley, Jr., governor of the State of Maine : The undersigned, citizens of Farmington, in the county of Franklin, being persons well acquainted with Luther Curtis, now confined in Auburn jail for the crime of cheating by false pretenses, believing that he has been sufficiently punished ; that the ends of justice do not demand that he should be longer incarcerated, and invoking the mercies of executive clemency, hereby petition your excellency for the immediate and unconditional pardon of the said Luther Curtis, and as in duty bound will ever pray.”

Among the grounds stated in favor of the motion is the following:

“IV. Because James Cutts, one of the jurors who was summoned as a talesman to serve on the panel which tried and returned a verdict in this case, was not legally qualified to serve thereon in said trial for the following reason :

“Said juror, having been summoned as aforesaid, was interrogated by the counsel for the plaintiffs, as follows : ‘Have you signed any papers or petitions to any persons or parties for the relief of either or all of these defendants since their conviction ?’

meaning the conviction of the defendants for the crime of cheating the plaintiffs by false pretenses. To which interrogatory said jurymen answered, 'I have not;' when, as matter of fact, said jurymen had heretofore, to wit. on or about the first of December last, signed a petition to the governor and council for the pardon of Luther Curtis, one of said defendants, which fact the plaintiffs and their attorneys were ignorant of till after said verdict, which facts the plaintiffs are ready to verify;" etc.

Cutts afterward deposed that he did sign the petition some little time after their commitment; that he remembered that the question was put to some of the jurors, whether they signed the petition referred to, but did not recollect that the question was put to him.

T. W. Voss, for plaintiffs.

H. W. Whitcomb, for defendants.

DANFORTH, J. On the 3d day of October, 1873, the defendant, Warren, procured of the plaintiff company a policy of insurance payable to himself, upon the life of his sister, Serecta Anna Warren. The policy was issued upon an application purporting to have been signed by the assured and his sister, in which the health of the said Serecta was fully set out and described in answer to questions therein propounded. Very soon the said Serecta died, and upon proof of the death the company paid the amount due, and now seek to recover it back on the ground of fraudulent representations, in which it is alleged that all the defendants were participants. These alleged fraudulent representations consist mainly in the answers found in the application relating to the health of the person to be insured. In order to establish these allegations, the plaintiffs offer certain declarations of the said Serecta, relating to her health at or about the time of the application, and others made just before her death, for the purpose of showing the falsity of the answers in the application.

These declarations offered and rejected were of two classes, first, those which relate to, and are descriptive of her health and feelings at the time they were uttered; and second, those "concerning the cause of her then present sufferings, and the length of time they had existed." We think those properly coming under the first class should have been admitted.

Asbury Life Insurance Company v. Warren.

Usually such testimony comes from a party, and is offered in his own behalf. In this case it comes from one who was neither a party to the record, nor in interest, one who, if she had been living, would have been a disinterested witness pecuniarily. Still the same principles apply in either case. The health of the person whose life was insured was the ground upon which the policy was issued, and a true description of it was necessary to the validity of the contract.

If the action were upon the policy, it might have been sufficient to show the representations false. In this case it is necessary to go one step further, and bring a knowledge of it home to the defendants, to show that they were participants. In either case, the truth of the representations is in issue, and the principles applicable to the testimony upon this issue the same.

The general rule applicable to such cases would make this testimony hearsay. But to this rule there are many exceptions, and when the declarations come within any exceptions they become original testimony. When the fact of such a declaration having been made is to be proved regardless of its truth, it is original testimony necessarily. When an act of a third party is material, and has more or less weight according to the motive which prompted it or the purpose for which it was done, under well-known and established principles of law, any contemporaneous declarations explanatory of that act are admissible as a part of it. The same principle will apply when it is material to prove the physical health or bodily or mental feeling of any person.

In this case it became important to prove the condition of health in which the said Serecta was at the time of the application. Witnesses testified as to certain indications of ill health. These indications may have a slight or a deep foundation, or may be entirely illusory. What she may have said in explanation of them at the time has universally been regarded as *res gestæ*, and, as such, original evidence. Greenleaf, in his work on Evidence, vol. 1, § 102, states the rule thus: "Wherever the bodily or mental feelings of an individual are to be proved, the usual expression of such feelings, made at the time in question, are also original evidence." In the same section he says: "So, also, the representation by a sick person, of the nature, symptoms, and effects of the malady under which he is laboring at the time, are received as original evidence."

Asbury Life Insurance Company v. Warren.

It is particularly to be noticed that in this definition the declarations are such as are "made at the time in question," and relate to the "malady under which he is laboring at the time."

In *Bacon v. Charlton*, 7 Cush. 581, 586, BIGELOW, J., says: "The rule is now well settled, and forms an exception to the general rules of evidence, that where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor." In *Insurance Company v. Mosley*, 8 Wall. 397, the rule with its limitations and restrictions is fully stated and settled in accordance with the other authorities cited. The rule itself seems now to be settled beyond question; the only difficulty is in its extent and application. In the case last cited the principle seems to have been carried to the extreme limit, and so far that two of the judges in a very able opinion by CLIFFORD, J., dissented in part.

The principle as laid down by Greenleaf and Bigelow, above cited, was not questioned, but its application to certain declarations as to the cause of the injury was denied in the dissenting opinion, while the court admitted the declaration on the ground that it was so near the time, and so connected with it by the circumstances developed, that it was in fact a part of the thing to be proved. *Ashland v. Marlborough*, 99 Mass. 47, is to the same effect. So, also, *Jacobs v. Whitcomb*, 10 Cush. 255.

Is the rule sufficiently extensive to cover the declarations in relation to the "cause of her then present sufferings, and the length of time they had existed?" From the testimony we learn that these declarations were made a few hours before her death, and after she became conscious that she could not live, and relate to her condition, not at the time when made, but some time previous, and before the date of the application for the policy. They contain undoubtedly important testimony, as bearing upon the issue. But in no sense can they be considered as part of the *res gestæ*. They were not the "natural expression" of her then condition, but simply a narrative of that condition as it was at some previous time. BIGELOW, J., in *Bacon v. Charlton*, above cited, says: "Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Any thing in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations

Asbury Life Insurance Company v. Warren.

and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady."

In *Emerson v. Lowell Gas-light Co.*, 6 Allen, 146, it was held that "a plaintiff's narrative of past events, though made to his attending physician, are incompetent evidence in his favor."

There is undoubtedly a distinction to be made between declarations made to an attending physician, and such as may have been made to others; much more liberality is to be allowed in the former case than in the latter. This is allowed on the ground of their necessity, to enable the physician to form an opinion as to the true condition of the patient, as well as because the professional man is less liable to be deceived than others. But even in such case it is rather to show the reasons and foundation of the medical opinion, than as substantive proof of the facts stated. *Barber et ux. v. Merriam*, 11 Allen, 322. But the limits of the rule under discussion are so clearly laid down by CLIFFORD, J., in his dissenting opinion in *Insurance Co. v. Mosley*, that it is unnecessary to pursue the discussion further. It is clear that the rule itself is not sufficiently broad to cover the second class of declarations offered, while the principles upon which it is founded, and the limitations to it, established by the decisions, will exclude them.

But it is claimed, that as the application was produced by the defendants, with Serecta's name attached to it, thereby giving it her sanction, the plaintiffs should be permitted to put in her subsequent conflicting statements to prove its falsity. But she was in no sense a witness. The defendants had procured the application either with or without her genuine signature, and passed it to the company, vouching for its truth; and, so far as this question is involved, it is immaterial whether the signature was hers or otherwise. They not only vouched for its truth, but one of them at least authorized the inference that it had her sanction. If she ever had any interest in it, that interest ceased as soon as it passed from her. Whether it passed from her as true or false, she could certainly have no stronger relation in the transaction, to those receiving it, the defendants, than that of vendor or assignor. In such case, it is well settled that her subsequent declarations cannot be received to impeach that to which she has given currency; and this would be quite true if it never had had her sanction. In either case she would have stood in the same relation as any other person competent to be a witness, but whose declarations not

under oath, and without an opportunity of cross-examination, are subject to all the infirmities of hearsay testimony. The declarations of a vendor after the sale cannot be received to impeach his title, or that of his vendee. *Greene v. Harriman*, 14 Me. 32; *Fisher v. True*, 38 id. 534; *Bartlet v. Delprat*, 4 Mass. 702; 1 Greenl. Ev., § 180; *Hatch v. Bates*, 54 Me. 136.

In opposition to these cases we have that of *Aveson v. Lord Kinnaird*, 6 East, 188, cited and relied upon in the argument. This case, so far as the question under discussion is concerned, is like the present and fully sustains all that is claimed for it. It is cited in *Gilchrist v. Bale*, 8 Watts (Penn.), 355, as authority for the doctrine there enunciated, though the latter case does not go so far as the former. It is also cited in many more modern cases with approbation and without any suggestions that the principles sustained are in any respect to be limited or qualified. In an earlier case, that of *Climer v. Littler et al.*, 3 Burr. 1244, where a question arose as to which of the two wills should be established as the true one, the later was in the handwriting of William Medlicott, who had possession of both, and was also a subscribing witness to the last one. This Medlicott, on his death-bed, took the earlier will from his bosom, and delivered it to his sister, saying "it was the true will," and at the same time declared that the latter will "was forged by himself." The sister was a witness and testified to these acts and declarations without objection. Upon a motion for a new trial, it was objected that this testimony should not have been received. But Lord MANSFIELD, after alluding to the fact that it came in without objection, said, "as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience, I am of the opinion the evidence was proper to be left to the jury." This case would certainly seem to have a decided tendency to support the principle established in *Aveson v. Lord Kinnaird*, in its full extent.

But a more careful examination of it will very much detract from its force in that respect. Both wills were in the possession of Medlicott, and had by him been secreted, and the competency of the testimony is made evidently to rest very much, if not mainly, upon these facts. In the opinion it is further said in relation to the first will, "it was necessary to show how it was secreted, and how it was discovered; the declaration of Medlicott in his last illness, when he delivered it for the use of the plaintiff, is allowed to

Asbury Life Insurance Company v. Warren.

be competent and material evidence;" and of the last, "the instrument of 1745, it was equally in his custody and secreted. The account he gave of it in his last moments is equally proper." We think, therefore, the decision may be sustained upon the ground that the declarations were a part of the *res gestæ*, and does not afford much aid to *Aveson v. Lord Kinnaird*, in sustaining the principle under discussion.

In *White et ux. v. Holman*, 12 Me. 157, 160, WESTON, C. J., after analyzing *Aveson v. Lord Kinnaird*, says, "in our opinion, no general principle can be extracted from a case so peculiar in character."

In *Stobart v. Dryden*, 1 M. & W. 615, it was *held* that declarations made by a deceased attesting witness, respecting the attested instrument, are not admissible in evidence, though admissions of fraud or forgery on his own part, and though his handwriting has been proved as proof of the instrument, and *Aveson v. Lord Kinnaird* was overruled.*

Thus it will be seen that the last-named case, so far as it authorizes the declarations of past transactions, feelings and facts, whether for the purpose of proving the past state or condition of health of the person making them, or of impeaching an instrument to which such person by his acts or signature had given credit, is contrary to well-established principles and nearly all the authorities to which our attention has been directed.

The result is that such declarations of the said Serecta as were descriptive of her state of health at the time they were made, and were "such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady," as were offered and excluded, should have been received. While the second class offered, relating as they did to her past condition, and being "in the nature of narrative or statement," were properly excluded. It is to be understood that in order to make such declarations admissible, it must first appear that at the time when made, her condition as to health was a material fact to be proved.

We do not mean to intimate an opinion that it may not be material to prove the nature of the disease of which she died; and

*FOLGER, J., thought *Stobart v. Dryden* did not overrule *Aveson v. Kinnaird*. See *Swift v. Mass. Ins. Co.* (68 N. Y. 186), 20 Am. Rep. 522, 523.—RMP.

Asbury Life Insurance Company v. Warren.

in proving that, such declarations as come within the principle indicated may be admissible. If from such proof it should appear that her death was caused by such a disease as must necessarily have existed from a period anterior to the date of the application, or by a fair inference may be considered as having a bearing upon her condition at that time, we see no objection to its use for that purpose.

There is also a motion in the case to set aside the verdict because it is against the law and the evidence, and "because James Cutts, one of the jurors, who was summoned as a talesman to serve on the panel which tried and returned a verdict in this case, was not legally qualified to serve thereon in said trial."

It appears from the testimony that two of the defendants, Warren and Curtis, had prior to the trial in this case been convicted under an indictment for the same offense as that charged in the writ, and had received their sentence therefor. The testimony also satisfactorily shows that the juror, Cutts, had signed a petition for the pardon of Curtis on the ground that "he had been sufficiently punished," and that on being interrogated in regard to the matter, he denied it. Whether this denial was from a want of memory or otherwise does not appear; nor is it necessary that it should. It was a fact material for the counsel for the plaintiff to know and which was kept from him. If the juror had in writing expressed a belief in the defendant's guilt or innocence it would not probably have been claimed that he was possessed of that entire impartiality which is proper in the trial of a cause. A much more serious objection as we think lies when, as in this case, the opinion is not only entertained that his punishment has been sufficient but expressed in writing, and that writing made known at least to the friends of the defendant, and especially such as have made manifest the most interest in relieving him from any further penalty. In the former case the mind, certainly, of a candid man would still be very much influenced on listening to the testimony, and if decided, might be expected to be controlled by it. But in the latter case it is hardly conceivable that the testimony should have any effect whatever. The guilt is admitted, and it is believed that the punishment already suffered is adequate to the crime, and after such an exhibition, how shall the juror justify himself to the friends of the accused if he should assent to a verdict of guilty. It is true that the criminal and civil liability for the same offense are entirely

Asbury Life Insurance Company v. Warren.

distinct ; but this hardly mends the matter and may perhaps make it worse. The prosecutors in the civil action would almost certainly be looked upon as the complainants in the criminal, and the result would be that the plaintiff would be looked upon as at least attempting to push the matter to the extent of the law without regard to justice ; and thus on the part of the juror, prejudice against the plaintiff would be added to sympathy for the defendant. We think a person thus situated could hardly possess that impartiality which the law requires in a juror ; and he certainly would not inspire that degree of confidence which it is very desirable the parties should have in the tribunal which tries their causes.

The verdict in this case is so clearly against the testimony that it would be difficult to account for it upon any other ground than that the jury failed to comprehend the distinction between a civil and criminal proceeding upon the same charge, and thus the plaintiff's rights, as well as the defendants' liabilities, appear to have been overlooked or ignored.

Exceptions and motion sustained.

CASES

IN THE

COMMISSION OF APPEALS

OF

NEW YORK.

RIDER v. WHITE, appellant.

(65 N. Y. 54.)

Animals — liability of owner of dog for injury.

One injured by the bite of a dog may recover damages of its owner on proof that the dog was vicious and that the owner knew it, without showing that it had ever before bitten any one.

ACTION to recover damages for injuries alleged to have been inflicted by the bite of a dog belonging to defendants.

Defendants were the owners of a factory on Barren Island; their premises were uninclosed. They owned and kept thereon seven large dogs which the evidence tended to show were vicious and ferocious, rushing out at and pursuing people coming on or near the premises, and that defendants had knowledge of their propensities. Plaintiff was walking along the beach of the island, early in the morning, near defendants' factory, when the dogs rushed out at and attacked him, biting and injuring him. No evidence was given that the dogs had ever actually attacked and injured a person before. Further facts appear in the opinion.

The plaintiff had a verdict, and the judgment entered thereon was affirmed by the Supreme Court, and defendants appealed.

Rider v. White.

Geo. W. Stevens, for appellants. *Scienter* of the disposition of the dog and not negligence in keeping was the gist of the action. *Card v. Case*, 56 C. B. 622; *May v. Burdett*, 9 Q. B. 101; *Fleming v. Orr*, 2 Macq. H. L. Cas. 14 *Fairchild v. Bently*, 30 Barb. 147; *Kelly v. Tilton*, 3 Keyes, 263; Arch. on Plead. 190; *Van Leuven v. Lyke*, § N. Y. 515; *Koney v. Ward*, 36 How. Pr. 255. Plaintiff was a trespasser and entered defendants' premises at his peril. *Sarch v. Blackburn*, 4 C. & P. 297; *Hogan v. Sharpe*, 7 id. 755; *Loomis v. Terry*, 17 Wend. 496.

Mr. Miller, for respondent.

GRAY, C. The defendants rest their appeal upon three grounds : First, that the injury inflicted upon the plaintiff by their dogs was at a time when he was committing a trespass upon their premises. Second, that there was no evidence that the dogs were vicious, or, assuming them to be so, there was no evidence that the defendants had notice of their vice in the respect complained of. Third, that there was no evidence that, before the injury committed by them upon the plaintiff, their dogs had ever bitten any one.

The defendants' premises consisted of an undefined parcel of an open space, situated upon an island, through or along which was a public highway, in no way defined by any visible monuments, upon the premises or otherwise, than by a map which one witness had seen in the possession of a Mr. Bradley, in the city of New York. The existence of this map, or of the precise locality of the highway over or along the premises occupied by the defendants, was, so far as the evidence shows, unknown to the plaintiff. The injury complained of by the plaintiff was committed in the day-time, while he was passing along the beach of the island, between the defendants' factory, where the dogs were kept, and the water — a place where others were accustomed to pass. The evidence is slight, if there be any, tending to prove that the place where the plaintiff was attacked was a part of the defendants' premises, and not any to prove that he was intentionally a trespasser in being there. In any aspect of the case, therefore, the defendants had not the right, either by their dogs or otherwise, to inflict an injury upon him without first giving him notice and time to leave the premises.

There was evidence tending to prove that the dogs were vicious. One of them was kept chained a portion of the

time ; one of the defendants warned a party to beware of them, saying one of them was very ugly. It was shown that they ran out furiously at passers-by, indicating a disposition to inflict an injury upon them, and were occasionally called in by persons in the defendants' employ. This, considered with other evidence in the case, tended to show that their vice was known to the defendants, who had caused a sign to be erected on their premises, not in sight of the place where the plaintiff was passing, inscribed, "Beware of dogs" ; and the other defendant, when apprised of the injury inflicted by them upon the plaintiff, after expressing his regret, said, "They were large dogs, and he must have had a serious time." Whether the dogs were vicious to an extent that endangered life or limb, and were prone to attack persons, and that the defendants had knowledge of that propensity, were questions fairly raised by the evidence, and were properly submitted to the jury. But it is in substance insisted that, even though the plaintiff was not intentionally a wrong-doer by being upon the defendants' premises, and that they were aware that their dogs had such vicious propensity, they, nevertheless, are not liable for the injury inflicted, for the reason that it was not shown that either of the dogs had ever before that time bitten any one ; in other words, that, however much the life or limb of innocent persons might, to the knowledge of these defendants, have been exposed to danger by the vicious propensity of their dogs, they are not liable for this, being the first injury inflicted, notwithstanding they had just reason to believe that such injury would, under like circumstances, occur. The law has gone far to shield those who have kept dogs for the protection of their property, from the consequences of injuries to persons inflicted by them, but not so far as to protect the keepers of such as are known to them to be ferocious to a degree that endangers the safety of such as are unwarned and innocently upon their premises, from the consequences of wounds inflicted by them.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Armour v. Michigan Central Railroad Company.

ARMOUR, appellant, v. MICHIGAN CENTRAL RAILROAD COMPANY.

(65 N. Y. 111.)

Common carrier—false bill of lading—liability of carrier to one making advances on.

Defendants' agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, gave M. bills of lading for the goods mentioned in the receipt, knowing that he intended to raise money on the bills, and plaintiff advanced money to M. upon the security of the bills. *Held*, that the defendants were bound by their agent's acts and estopped from denying the receipt of the goods.*

ACTION upon bills of lading issued by the defendants' agent. The case was sent to a referee, who reported the following facts in substance.

That on the 7th day of October, 1867, one D. D. Michaels produced and delivered to the defendants' agent, in the city of Chicago, a paper purporting to be a receipt, signed by I. T. Sunderlin, dated the second of the previous July, for 200 tierces prime lard, his brand and manufacture, in store for account and risk of said Michaels, to be held subject to return of said receipt properly indorsed, and payment of storage, usual rate, loss and damage by fire or leakage at owner's risk, marked M. That Michaels delivered to the defendant's agent his order on Sunderlin for 100 tierces of lard, and thereupon the defendant, by its agent, executed and delivered to Michaels a bill of lading, or carrier's receipt, acknowledging the receipt from him of 100 tierces of lard consigned to the plaintiffs, at New York, and to be there delivered to them. The defendant, at the request of Michaels, afterward, and on the 12th of October, 1867, on the faith and credit of what purported to be Sunderlin's warehouse receipt, having in the meantime, at the request of Michaels, omitted to call on Sunderlin for the 100 tierces, executed and delivered to Michaels another bill of lading, acknowledging the receipt from him of the other 100 tierces of lard, like the previous 100 tierces consigned and to be transported to the plaintiffs, at New York. That the defendant, at the time when these bills of lading were issued, was informed by Michaels that he

* See *Baltimore & Ohio R. R. Co. v. Wilkens*, ante, p. 26.

Armour v. Michigan Central Railroad Company.

intended using the same at bank the same day. That Michaels, on the 7th of October, made his draft upon the plaintiffs for \$3,600, to which he attached the defendant's bill of lading of that day, and on the twelfth he made another draft upon the plaintiffs for the further sum of \$3,600, to which he attached the bill of lading of the latter date, each of which drafts were made payable to the order of and was delivered to the Manufacturers' National Bank of Chicago, by whom they were, with the bills attached, transmitted to New York, and there caused to be presented to the plaintiffs for payment; and that the plaintiffs, on the faith and credit of the respective bills of lading, paid the first draft on the 10th or 11th of October, 1867, and the second, on the 15th or 16th of the same month. It was soon after, and prior to the 23d of the same October, discovered that the receipt purporting to have been signed by Sunderlin for the 200 tierces of lard, was a forgery committed by Michaels, and that he had not the property referred to therein in the hands of Sunderlin; of this the defendant had no prior knowledge or information, but, acting in the belief of the genuineness of the receipt, and that a certain 197 tierces of lard in Sunderlin's possession, as warehouseman, branded I. T. Sunderland, was the property intended to be covered by the receipt, caused them to be seized and placed in his possession, and transported to New York, where they arrived prior to the 30th of the same month. On that day, the plaintiffs presented to the defendant's agent in that city the two bills of lading, and requested the delivery to them of the 200 tierces of lard therein mentioned, with which request he refused to comply; and thereupon, on that day, the plaintiffs commenced this action. On the 1st day of November following. Walbridge, Watkins & Co., having the right of property and possession of the 197 tierces of lard, brought an action of replevin therefor, in the Supreme Court of this State, against the Hudson River Railroad Company, in whose possession the lard then was, and thereby obtained the possession thereof, of which the plaintiffs were notified by the defendant, with a request to appear and defend, and a consent to substitute, instead of its attorney, any attorney they might name. They did not appear in the action, and, by the judgment therein, it was adjudged that the plaintiffs therein had the right to recover the 197 tierces of lard.

Armour v. Michigan Central Railroad Company.

As a conclusion of law from these facts, the referee found that by the bills of lading, or carrier's receipts, and the delivery of them to the plaintiffs attached to Michael's drafts upon them, and the payment by them of those drafts, they acquired all the rights of Michaels; and it being shown that the goods received by the defendant for transportation under its contracts were 197 tierces of lard, to which Walbridge, Watkins & Co. had paramount title, and right of possession, the defendant was legally excused for the non-delivery of the 197 tierces; and that for the value of the remaining three tierces, the plaintiffs were entitled to recover, and ordered judgment against the defendant for \$142.30, the balance thereof.

Judgment was entered in accordance with those conclusions.

Further facts appear in the opinion.

Benj. K. Phelps, for respondent. The right of action for defendant's failure to deliver the lard was in Michaels, and had never vested in the plaintiffs. *Blanchard v. Paige*, 8 Gray, 281; *Lickbarrow v. Mason*, 1 H. & W. Notes, Phil. Ed. 1855; *Thompson v. Dominy*, 14 M. & W. 403; *Joseph v. Knox*, 3 Camp. 320; *Sargent v. Morris*, 3 B. & Ald. 277; *Dornett v. Beckford*, 5 B. & Ad. 521; *Moore v. Wilson*, 1 T. R. 659; *Byrne v. Weeks*, 7 Bosw. 380; *Dows v. Green*, 24 N. Y. 638. Plaintiffs, assignees for value of the bills of lading, acquired only the title of their assignor in the goods described therein. 8 Gray, 298. Without proof of special authority in defendant's agent to execute bills of lading for goods not actually shipped or received for shipment, it is not liable upon a bill of lading executed by its agent without any actual receipt of the goods. *Grant v. Norway*, 10 C. B. 666; *F. & M. Bk. v. B. & D. Bk.*, 16 N. Y. 141, 151; *Sch. Freeman v. Buckingham*, 18 How. (U. S.) 182. Defendant's failure to deliver to plaintiffs was excused by the taking of the goods from its possession by process of law. *Bliven v. H. R. R. R. Co.*, 36 N. Y. 403; Story on Bail, §§ 120, 226, 582; *Shelbury v. Scotsford*, Yelv. 23; *Edson v. Weston*, 7 Cow. 278; *King v. Richards*, 6 Whart. 418; *Wilson v. Anderton*, 1 B. & Ad. 450; *Whittier v. Smith*, 11 Mass. 211; *Van Winkle v. U. S. M. S. S. Co.*, 37 Barb. 122; *Bates v. Stanton*, 1 Duer, 79; *Stiles v. Davis*, 1 Black (U. S.), 101; *Burton v. Wilkinson*, 18 Vt. 186; *Swift v. Dean*, 11 id. 323; *Turner v. Goodrich*, 26 id. 707; *Thorne v. Tilbury*, 3 H. & N. 534; *Humphrey v. Reed*, 6 Whart. 435. There was nothing to stop defendant from availing itself of the

Armour v. Michigan Central Railroad Company.

defense disclosed by the facts. *Mech. Bk. v. N. Y. & H. R. R. Co.*, 3 Kern. 599; *Sch. Freeman v. Buckingham*, 18 How. (U. S.) 182; *Hubberty v. Ward*, 18 Eng. L. & Eq. 551; *Bates v. Stanton*, 1 Duer, 79; *Coleman v. Riches*, 29 Eng. L. & Eq. 323; *Walter v. Brewer*, 11 Mass. 99; Redf. on Carr. 207, 208, 318. *Berkley v. Watling*, 7 Ad. & El. 29; *Bates v. Todd*, 1 M. & R. 106; Ang. on Carr., §§ 231, 237. The true owner of the goods had a right to them as against any one, and Michaels' fraud could in no way impair that right. *Everett v. Saltus*, 15 Wend. 474; 20 id. 267; *McEntee v. N. J. S. Co.*, 45 N. Y. 34; *Bassett v. Spofford*, id. 387; *Hents v. Idaho*, U. S. D. Ct. E. D. N. Y., July 11, 1871.

DWIGHT, C. The defendant in this action issued at Chicago to the plaintiffs, on October 7, 1867, a bill of lading of 100 tierces of lard of the brand "I. T. Sunderland, M.," containing 36,150 pounds. The bill stated that the lard was received from one D. D. Michaels, and was consigned to the plaintiffs, and was to be transported over the defendant's line and delivered to the consignee or owner at New York, the owner or consignee paying freight. The bill was signed by W. W. Street, agent for the defendants. On October 12, 1867, a similar bill was issued by the defendant to the same consignees of a like number of tierces marked "S.," also received from Michaels, which were to be also transported over the defendant's line and delivered to the consignee or owner at Ward's inspection yards, New York. This bill called for 36,150 pounds of lard, and was signed by the same agent. The freight in each case was not to exceed eighty-five cents per 100 pounds. The defendant, at the time of issuing these bills, had no lard in its possession or under its control. It was induced to issue them from the fact that Michaels exhibited to Street a paper purporting to be a warehouse receipt of one I. T. Sunderland, a warehouseman in Chicago, for 200 tierces of lard in favor of Michaels. This receipt was indorsed over to the defendant and delivered to Street, who, on the faith of it, issued the two bills of lading already described. The receipt purporting to be signed by Sunderland was a forgery. The result was, that, though the defendant had issued the bills of lading, it had no lard to represent them, nor a right to any lard in Sunderland's warehouse owned by Michaels. The latter person had an interest in some tierces of lard there, but on that a firm known as Walbridge, Watkins & Co. had a prior lien and

Armour v. Michigan Central Railroad Company.

were entitled to the possession. The defendant was informed by Michaels, at the time that the bills of lading were issued, that he intended to use them at bank, on the days on which they were respectively dated. No particular inquiry was made as to the genuineness of the warehouse receipt; the defendant's agent, Street, having confidence in Michaels, and having constant transactions with him. At the time above specified, Michaels drew his sight drafts on the plaintiffs, payable to the order of a bank in Chicago in two sums of \$3,600 each. The bills of lading accompanied the drafts, which were accepted and paid by the plaintiffs on the faith thereof.

As between the common carrier and the plaintiffs, this was a New York contract. It was to be performed in New York, and the acceptance of the drafts was made here.

After the defendant had discovered the forgery of the warehouse receipt made over to it by Michaels, on October 23, it commenced a replevin suit against I. T. Sunderland, the warehouseman, and took out of his possession 197 tierces of lard and shipped them to New York. These tierces did not have the same brands as those mentioned in the forged receipts. After the arrival of these tierces in New York, Walbridge, Watkins & Co. replevied them by an action in the Supreme Court commenced November 1, 1867, against the Hudson River Railroad Company, in whose possession they were. The plaintiffs received formal notice of this second replevin suit on December 10, but took no steps to defend the action. Judgment was subsequently recovered by Walbridge & Watkins against that company, it being adjudged that they had the right to recover the possession of the lard.

The plaintiffs duly demanded the lard of the defendant. Its value in New York, after deducting freight, was \$7,935.45.

The simplest way of arriving at the correct result in this case will be to inquire, in the first place, as to what would have been the rights of the plaintiffs in case the defendant had had the lard in its possession; next to consider the defendant's obligations as having no goods to correspond with the bill of lading; and finally, to take into account the effect of the proceedings in replevin.

1. In case the defendant had had in its possession lard to correspond with the bills of lading, the plaintiffs would have had the title to it in trust for Michaels after paying its own lien. It will

Armour v. Michigan Central Railroad Company.

be observed that the bills ran directly to the plaintiffs. The consignment was made to them. They are not assignees of bills made to Michaels, but the contract to deliver the lard is made by the defendant with them. They were not mere agents of Michaels, but they had an interest to the extent of \$7,000 and upward. This fact the defendant knew when the bills were issued, and it could not deny that it contracted to deliver the lard to the plaintiffs in case that it had the property in its possession. The effects of such a bill of lading running to a consignee who has made advances was considered in *The Bank of Rochester v. Jones*, 4 N. Y. 497, 502; *Haille v. Smith*, 1 Bos. & Pull. 563; *Allen v. Williams*, 12 Pick. 297; *First National Bank of Toledo v. Shaw*, 61 N. Y. 283. It was held in these cases, in substance, that where an owner of goods delivered them to a carrier, who issues a bill of lading to a consignee, who advances money on the faith of the bills, that the latter becomes owner for his own sake to reimburse himself, and after reimbursement, in trust for the former owner. *Haille v. Smith* is directly in point. In that case, G. & H. Brown, of Liverpool, wishing to draw upon L. Smith & Co., a banking-house in London, to a large amount, agreed, among other securities to be given, to consign goods to a mercantile house consisting of the same partners as the banking-house. The goods were consigned accordingly to the mercantile house. It was held that the consignment to the mercantile house transferred to it the general property in the goods in trust, and that the banking-house and consignors were both concerned as *cestui que trust*, and that the bill of lading operated as an evidence of the change of property. The principle of this case has been twice approved in this court (see the cases above cited), and must now be regarded as settled law. As applied to the facts of the present case, it would result that the plaintiffs would have had the legal title to the lard; that the contract for its delivery was made with them, and that in general they would have been able to vindicate their claim to the property by all the remedies incident to ownership and to a contract for transportation of their property.

II. It is now necessary to consider how far the fact that the company had no lard affects this question. This inquiry divides itself into two branches. One concerns the power of Street to bind the company by issuing bills of lading when it has no goods

Armour v. Michigan Central Railroad Company.

to correspond with the bills. The other is to consider the effect of the bills, assuming that the agent had the requisite authority. The defendant insists that Street could not bind it by issuing fictitious or non-representative bills of lading. It claims that his authority was confined to bills for goods actually within its control. It cites, to this effect, *Grant v. Norway*, 10 Com. Bench, 665; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182.

Grant v. Norway has been subject to much and severe criticism, as being adverse to the general view prevailing in the courts of this State, where confidence has been reposed in an agent and an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted. When one of the two innocent persons must suffer in such a case, that person must bear the loss who reposed the confidence. So far as *Grant v. Norway* stands in the way of this doctrine, it must be deemed to be overruled. Remarks of DAVIS, J., in *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 73. *Grant v. Norway*, however, is not precisely parallel with the present case. In that case the bill of lading was issued to a party who knew that the bill of lading was issued by an agent without authority, and was then transferred to a purchaser acting in good faith. It may, accordingly, be said with plausibility that the representation was not made to the assignee, who simply acquired the title of the fraudulent consignee. It would have resembled the case at bar if the plaintiffs had known of the forgery of Michaels when they took the bills of lading, and had then transferred them to persons paying value and acting in good faith. The case would then have been governed by the rule that an assignee of a thing in action must abide by the case of him of whom he buys. Remarks of SELDEN, J., in *Griswold v. Haven*, 25 N. Y. 604-606.

Street, having power to issue bills direct to consignees for goods actually in the possession of the defendant, and the present bills being in no ways distinguishable in form from those which were usually employed, he must be considered as having the necessary authority as to the plaintiffs acting in good faith.

The only remaining point under this branch of the case is, whether the defendant is not estopped by the statements in the bill of lading from denying that it had sufficient lard secured from Michaels to comply with its terms. The defendant's agent was

Armour v. Michigan Central Railroad Company.

informed by Michaels that the bills were to be used at bank on the same day. They were issued with the expectation that they would be acted upon by bankers or other capitalists. It cannot complain if the bills accomplished the purpose for which they were designed. The representations in the bills were made to any one who, in the course of business, might think fit to make advances on the faith of them. There is thus present every element necessary to constitute a case of estoppel *in pais*, a representation made with the knowledge that it might be acted upon, and subsequent action upon the faith of it to such an extent that it would injure the plaintiffs if the representation was not made good. It is now well settled that fraud is not necessary to constitute a case of estoppel. Though the defendant was induced by the fraud or mistake of Michaels to issue these bills, that is immaterial. Its liability depends on the fact that, no matter what its inducements may have been, it has made certain representations upon which the plaintiffs have advanced their money in good faith. If the defendant placed undue confidence in Michaels, it is but the familiar case of imposing the burden upon him who unwisely or unguardedly reposed the confidence. *Brown v. Bowen*, 30 N. Y. 519; *Manufacturers and Traders' Bank v. Hazard*, id. 226; *Shapley v. Abbott*, 42 id. 443; *Rawls v. Deshler*, 4 Abb. Ct. App. 12. The principle governing the present case was announced in the case of *Griswold v. Haven*, 25 N. Y. 595. It there appeared that the defendants John Wright & Co. issued receipts representing that they had in store, on account of Ford & Son, a quantity of grain. One of the defendants went with one of the firm of Ford & Co. to the plaintiff, and in reply to an inquiry from the plaintiff, stated that the grain was in good order and all right. It was held that the plaintiff having made advances on the faith of the statement, the defendants were bound by the act of their agent, and were estopped from denying that they had the grain in store. The difference in facts between this case and the one at bar makes no difference in principle. In the one case the statement was oral, in the other it was written. Both cases have the important and leading element that the agent knew that the statement was to be acted upon.

The fact that a bill of lading is not negotiable has nothing to do with the question. That point would have been open for discussion if the bills had been issued to Michaels and then assigned

Armour v. Michigan Central Railroad Company.

to the plaintiffs. As it was, the representations having been made direct to the plaintiffs, their right of action is not derived through Michaels, but rests upon the direct relations between themselves and the defendant. This view is sustained by the case of *Moore v. The Metropolitan Nat. Bk.*, 55 N. Y. 41. It is there held that a *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has by assignment conferred the apparent absolute ownership (such purchase being made on the faith of that ownership), obtains a valid title as against the real owner, who is estopped from asserting a title in hostility thereto. This view is also supported by *McNeil v. Tenth National Bank*, 46 N. Y. 325. The court in the *Metropolitan Bank Case* expressly affirms that a representation in a non-negotiable chose in action is equivalent in all respects, where it is acted upon (in accordance with the usual rules applied in cases of estoppel), to one made in the case of negotiable paper. As this is the latest utterance of the Court of Appeals, overruling *Bush v. Lathrop*, 22 N. Y. 535, so far as that case is inconsistent with it, it must be followed in this court.

If these views are correct, the plaintiffs in the present case might have brought an action of trover against the defendant for so many tierces of lard as the bill of lading called for. *Griswold v. Haven*, *supra*; *Harding v. Carter*, Park on Ins. 4; 1 Greenl. on Ev., § 208. The same rule is applicable to innocent mistakes which have been acted upon as to fraudulent misrepresentations. *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 27.

As it must be assumed that the defendants had lard to which the plaintiffs had the title, they could bring any action incident to ownership in case the lard was not delivered. The present action is accordingly well founded.

III. The action of replevin instituted against the Hudson River Railroad Company by Walbridge, Watkins & Co., had no effect upon the plaintiffs' right. There was no evidence that the lard seized in that action was that which the defendant was bound to deliver. It did not have the marks described in the bills of lading, nor was it *received by the defendant from Michaels*. On the other hand, it was obtained by the defendant from the warehouseman acting for the real owners (Walbridge & Co.) by its own wrongful act. It cannot set up a replevin suit which was caused solely by its unjustifiable intermeddling with the property of another in bar of its duty

to deliver lard which it professed to receive from Michaels on behalf of the plaintiffs.

The judgment should be reversed and a new trial ordered.

GRAY, C., also delivered a concurring opinion.

All concur, except EARL, C., dissenting.

Judgment reversed.

TIFFANY V. ST. JOHN, appellant.

(65 N. Y. 814.)

Tender to sheriff of amount of execution discharges lien.

Where an execution has been levied on goods, a tender by the judgment debtor, to the officer holding the execution, of the amount due discharges the lien of the execution, and a subsequent sale under it is unlawful, and renders the judgment creditor, having notice of the tender, liable in trover

ACTION for damages for the unlawful conversion of a canal boat belonging to the plaintiff.

On the trial it appeared that the boat was seized February 14, 1870, by the sheriff of New York, on an attachment issued out of the Marine Court of New York, in an action by this defendant against this plaintiff; that judgment was recovered in said action for the sum of \$68, an execution issued thereon and the attached property sold thereunder. Before such sale took place this plaintiff tendered to the sheriff, in the presence and hearing of the defendant, the sum of \$120, the full amount due on the execution. The sheriff refused to receive the money on the ground that it was insufficient. Thereupon the property was put up for sale and was sold, this defendant being present and bidding thereon.

The jury rendered a verdict for the plaintiff. Exceptions were ordered to be heard in the first instance at General Term, where judgment was ordered to be entered on the verdict. Defendant appealed.

Beebe, Wilcox & Hobbs, for appellant. A tender to the sheriff did not discharge the debt or judgment. *Jackson v. Law*, 5 Co. 252; 9 id. 641. A tender, to be effectual, must, in general, be made directly to the creditor or to his duly authorized agent.

Tiffany v. St. John.

Hornby v. Cramer, 12 How. 490; 2 Greenl. on Ev., § 607. The ruling that the burden of proof on the sufficiency of the tender was shifted to defendant when plaintiff proved he had offered nearly twice the amount of the execution was error. 2 Greenl. on Ev., § 601; 1 id., § 74; *Green v. Waggoner*, 2 Hilt. 297; *Costigan v. M. and H. R. R. Co.*, 2 Den. 609; *Boyden v. Moore*, 5 Mass. 365. The sheriff was entitled to a reasonable compensation for keeping and protecting the property which is not fixed by law. Code, § 243; Crocker on Sheriffs, §§ 1094–1097; *Smith v. Birdsall*, 9 Johns. 328; *Suprs. etc. v. Briggs*, 2 Den. 41; *Hoyt v. Phillips*, 1 Swe. 76.

William Tiffany, respondent, in person.

DWIGHT, C. The only exception available to the defendant in this cause is the motion for a nonsuit at the close of the plaintiff's case. There are some exceptions set forth in the printed case, which appear to have been made to the mere utterances of the judge in the course of the trial. They are not connected with the introduction of evidence, nor with any proposition in the judge's charge, so far as the printed case shows. The rulings appear to have been mere abstract propositions stated in a running conversation between the court and the defendant's counsel. They are not before us in such a form that we can pass upon their correctness.

The motion for a nonsuit was made upon two grounds: One was, that the plaintiff had not proved facts sufficient to constitute a cause of action, having proved that the boat was sold at a sheriff's sale, which must be presumed to have been regular. The other ground was that the plaintiff has not connected the defendant with the alleged conversion.

The facts that appeared at this stage of the cause were substantially as follows:

The plaintiff being the owner of the canal boat in controversy, which was lying, on the 14th day of February, 1870, at the foot of Wall street, New York, the sheriff seized it on an attachment. The attachment, which was produced in evidence, purported to issue from the Marine Court under the provision of the act (chap. 300, Laws of 1831) "to abolish imprisonment for debt," etc., for a debt of sixty dollars and interest from January 4, 1870, arising upon contract. The boat was detained until March 29, 1870, when, having been advertised for sale by the sheriff, it was sold by

him. At the time of the sale, the defendant St. John and his partner in the towing business (Lord) were present. The sheriff publicly offered the boat for sale "by virtue of an execution issued out of the Marine Court in favor of Hezekiah B. Lord and Josiah St. John." The plaintiff, as soon as this offer was made, tendered \$120 to the sheriff on the execution. The sheriff refused to receive the sum tendered, saying it was not enough, and went on with the sale. The boat was at first struck off to the defendant St. John, but another person having claimed the bid, it was put up again and sold to him for \$525. The sheriff put the purchaser in possession.

On this testimony, the motion for a nonsuit was denied.

The defendant then proceeded with the case, and put in evidence the certificate of the clerk of the Marine Court in the case of *Hezekiah B. Lord et al. v. William Tiffany*, containing the complaint, answer, attachment and execution. The plaintiff, after the defendant rested, offered further testimony to show that when he made the tender to the sheriff he spoke so loudly that any one upon the boat could hear him, and that the sheriff refused to receive the money, in a loud voice, and that he (the plaintiff) then forbade the sale. The defendant was not more than eight feet from him at the time, and from three to six feet from the sheriff, and was afterward heard to converse respecting the tender. This had always been kept good.

The propriety of a nonsuit must be regarded as though the motion for it had been made at the close of the case, the additional evidence after its denial, furnished by the plaintiff, being taken into account. *Schenectady Plank-road Co. v. Thatcher*, 11 N. Y. 102; *McCotter v. Hooker*, 8 id. 497; *Jackson v. Leggett*, 7 Wend. 377.

If the act of the sheriff was unauthorized by law, there was sufficient evidence to go to the jury that the defendant was aware of it, and thus to make him liable for the conversion. The only point, therefore, which needs to be considered is, whether the proceedings by the sheriff were regular. In other words, did the tender made by the plaintiff discharge the lien of the execution, or in any manner affect the rights of the sheriff to sell upon it? This question must be solved, first, by considering whether a tender plainly sufficient in amount would affect the sheriff's capacity to sell; and, second, if so, whether there was *prima facie* evidence in the present case to show that the tender was sufficient?

Tiffany v. St. John.

First. It is a general rule of law that where a person holds a lien upon property, a tender by the owner of the property of the amount of the lien will discharge it. In fact, the detention of the goods upon a different and inconsistent ground will be a waiver of the lien. *Boardman v. Sill*, 1 Camp. 410, n; *Winter v. Coit*, 7 N. Y. 288; *Weeks v. Goode*, 6 C. B. (N. S.) 367. It is a well-settled rule in the law of pledges that if the money for which the goods are pawned be tendered to the pawnee, and he refuses to receive it, he becomes thereby a wrong-doer, and his special property in the chattel is determined. *Coggs v. Bernard*, 2 Ld. Raym. 909. It is said, by Comyn, "that by tender of the money the property in the goods is determined, and the pledge ought to be returned; but if the pawnee refuse to restore the pledge upon tender, trover lies against him." Com. Dig., tit. Mortgage, A, and cases cited. The principle governing the subject is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or a right of distress. Per COMSTOCK, J., in *Kortright v. Cady*, 21 N. Y. 366. Upon these principles, it has been held that if the debtor tender the debt to the pledgee, and he refuse to deliver up the pledge, he is liable, though it be subsequently lost, or even forcibly taken from him. Chitty on Cont. (11th ed.) 670; *Ratcliffe v. Davis*, Yelv. 179; Bull's N. P. 72. This principle was applied to mortgages of real estate in *Kortright v. Cady*, *supra*, where it was held that a tender of the debt, either upon or after the law day, extinguishes the mortgage, and leaves the mortgagee only a creditor of the mortgagor.

It is, however, claimed that this doctrine does not apply to the lien of an execution, as that is created by operation of law. This case, however, cannot be distinguished in principle from that of a pledge. In each case, the lien exists as a collateral advantage to the creditor. It is incidental to the debt. In each case, if the lien is not satisfied, there is a power to sell. Payment will extinguish the one as well as the other. If the theory propounded by COMSTOCK, J., in the case above cited, be correct, and it is believed to be sound, the tender is equivalent to payment, and is as effectual in destroying the lien as in the case of a pledge. A tender will discharge the lien of an attorney. Stokes on the Lien

of Attorneys, 81, 172; *Jones v. Tarleton*, 9 M. & W. 675; *Scarfe v. Morgan*, 4 id. 280; *Irving v. Viana*, 2 Y. & Jer. 71, 72. There is, undoubtedly, a stage in a proceeding in an action where property is in the custody of the law, that a tender will not destroy the lien, as that might interfere with the proper disposition of the case. After the action is over, and judgment obtained and execution levied, the case becomes clearly assimilated to that of an ordinary lien, and if tender is made, and not accepted, the lien will be extinguished. This distinction was well settled as far back as the time of Lord COKE, and is clearly stated in the *Six Carpenters' Case*, 8 Coke, 146, *a*. The point there discussed was the effect of a tender in the case of a distress for rent or of cattle doing damage — an instance of a lien created by the act of the law. COKE considers the distinction between a tender made upon the land before distress, after the distress and before impounding, after impounding and before the termination of the litigation, and contrasts these with a tender made after the law has determined the rights of the parties. He says: "Note, reader, this difference, that tender upon the land before the distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for it then comes too late, because then the case is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has returned irreplevisable, yet, if the plaintiff makes him a sufficient tender, he may have an action of *detinue* for the detainer after, or he may, upon satisfaction made in court, have a writ for the redelivery of his goods." He adds: "And therewith agree all the books, and *Pilkington's Case*, in the fifth part of my reports (fol. 76), and so all the books which, *prima facie*, seem to disagree are, upon full and pregnant reason, well reconciled and agreed."

There is here a clear statement of the principle applicable to the case at bar. Here the law has already determined the right which has become final in analogy to the "return irreplevisable" of Lord COKE, and the tender having been made and refused, if it were sufficient in amount, an action of replevin in the *detinet* will lie in analogy to the action of *detinue* referred to by him. It should also be observed that Lord COKE's rule provides that the owner of

Tiffany v. St. John.

goods has his election to make an application to the court for relief.

The defendant cites, in opposition to these views, the case of *Jackson v. Law*, 5 Cow. 248 ; S. C., 9 id. 641. That case, however, has no bearing upon the present controversy. The point there decided was that a tender of money due upon a judgment, by a junior judgment creditor, did not discharge it, nor take away the lien of the senior judgment creditor upon lands, but that the latter might still redeem upon his judgment within the terms of the statute applicable to that subject.

The ground of this decision briefly was that a judgment being a debt of record is not discharged by a tender, as it is, in no case, the effect of a tender to discharge the debt. The judgment could only be extinguished by actual satisfaction. As long as it remained in force it must, by its very nature, as prescribed by statute, be a lien on the land. If its existence continued it could not be deprived of its ordinary and usual characteristics. The case is very different with a pledge or mortgage, or lien of any kind collateral to the debt. To this class of collateral liens an execution belongs, and on general principles a tender destroys it. Even in a case of a judgment a tender may have such an effect as to make it inequitable to enforce the lien, and a court of equity may set aside a sale under it as irregular and void. *Mason v. Sudam*, 2 Johns. Ch. 172. It is not necessary in this class of cases, when the effect of a tender is to destroy the lien, to keep the tender good or to pay the money into court. The tender having discharged the lien, its entire result has been accomplished for the purposes of the present action. *Kortright v. Cady*, *supra*.

Second. The tender in this case was *prima facie* sufficient in amount. The judgment in the Marine Court was for sixty dollars damages and eight dollars and forty-four cents costs. The tender was \$120, and was declined on the ground of insufficiency. At the trial the defendant offered no evidence to show any reason why more than the face of the judgment was due from the plaintiff. He did not show that the sheriff had been put to any expense, or that he had put a man in possession, or any fact whatever from which a duty on the part of the plaintiff to pay could possibly be inferred. The defendant refers for his right to make a charge to section 243 of the Code of Procedure. That section only refers to proceedings under attachment in courts of record, and is not ap-

plicable to proceedings in the Marine Court. The attachment and judgment took place by virtue of chapter 300, Laws of 1831, from the twenty-ninth to the forty-seventh sections, inclusive. These are the sections applicable to courts of justices of the peace. I can find no statutory authority giving the officers of these courts power to make charges additional to their regular fees. If they have any claim beyond these it must be vested upon some implied obligation of the debtor to pay. The facts from which such an obligation was to be inferred would need to be proved.

It is true that a constable is responsible for the safety of the property he attaches, and is considered as a bailee and accountable for ordinary negligence. He is accordingly to provide for its safe-keeping. Cowen on Attachments, 93. Still the law has given him no specific allowance for the service, assuming that the compensation is included in his ordinary fees. These fees, as prescribed in the Revised Statutes and as collected in Crocker on Sheriffs (§§ 1170, 1181), fall far short of the amount tendered.

I think that, under the circumstances, the plaintiff made a *prima facie* case, and that his tender was sufficient on the hypothesis that the sheriff was the defendant's agent. There was also evidence of that fact, as the tender was made in the presence and hearing of the defendant, and the refusal was made by the sheriff without his objection. It was not erroneous to refuse the motion for a nonsuit, as, if the defendant ratified the act, he must be considered as having refused the tender and was a co-trespasser with the sheriff. It is laid down in Crocker on Sheriffs (§ 420, ed. 1871), that where money is tendered to the sheriff upon an execution in his hands, it is his duty to receive it and forbear to levy and sell; and if he does levy and sell after a valid tender of the full amount of the debt and costs, he is a trespasser. The matter was properly submitted to the jury to determine the knowledge and intent of the plaintiff as well as the other facts in the case.

There was no error in the disposition of the cause in the court below, and the judgment should be affirmed.

All concur.

Judgment affirmed.

COOKE, appellant, v. MILLARD.

(65 N. Y. 363.)

Statute of frauds — sale — "receipt and acceptance" — when title passes.

Defendants verbally ordered lumber of plaintiffs, to be taken from certain lots designated by defendants in plaintiffs' yard, and to be cut by plaintiffs into sizes required by defendants and placed on plaintiffs' dock, and notice to be given to defendants, who agreed thereupon to take it. Plaintiffs filled the order, placed the lumber on the dock and gave notice to defendants, as agreed, but before they removed it it was accidentally burned. *Held*, that the contract was one of sale under the statute of frauds; that there was no receipt and acceptance of the lumber by defendants; that the title thereto had not passed, and that defendants were not liable for the price agreed to be paid.

ACTION to recover the price of lumber alleged to have been sold and delivered by plaintiffs to defendants. The defense was that the contract was oral; that the lumber was never delivered to or accepted by defendants; and that the contract was void under the statute of frauds.

The case was sent to a referee for trial, who reported in substance that the defendants, desirous of purchasing lumber, went to plaintiffs' yard in Whitehall on the 5th of September, 1875, and orally gave an order to the plaintiffs for a certain quantity of lumber of the kind and quality in the yard, but which needed to be dressed and cut into different sizes. No particular lumber was selected, nor was any part of the lumber then in the yard in condition to be then delivered. The plaintiffs agreed to cut and dress the lumber as directed and to place it on their dock and to give notice thereof to defendants' agent, who was thereupon to send a boat and take the lumber away.

The plaintiffs prepared the lumber for delivery and placed it on their dock, and notified the defendants' agent thereof, as agreed, but the next day and before it was removed it was accidentally destroyed by fire. The plaintiffs bring action for its agreed price, \$918.

The referee decided that the contract was void, and ordered judgment for the defendants.

This order and judgment were affirmed by the General Term, and the plaintiffs appealed.

Martin W. Cooke, for appellants.

Thompson & Weeks, for respondents.

DWIGHT, C. No exceptions were taken in this case, except to the conclusions of law derived by the referee from the facts as found in the report. There are but two questions to be considered : One is, whether the contract is within the statute of frauds ; the other is, if it be held that it is within the statute, were the acts done by the parties sufficient to comply with its terms, so as to make the contract enforceable in a court of justice ?

In order to determine whether the contract is within the statute, it is important briefly to state the exact acts which the plaintiffs were to perform.

The contract was plainly executory in its nature. There were no specific articles upon which the minds of the buyer and seller met, so that it could be affirmed that a title passed at the time of the contract. The seller was to select, from the mass of lumber in his yard, certain portions that would comply with the buyer's order. The purposes of the parties could not even be accomplished by the process of selection. The lumber must be put in a condition to answer the order. It must be dressed and cut into required sizes. The contract called for distinct parcels of surface pine boards, clapboards and matched ceiling. Part of the lumber was surfaced, and a portion of it still in the rough. The clapboards were manufactured from stuff one and a quarter-inch thick. It had to be split, surfaced and rabbeted. The order for the various items was a single one, there being 15,441 feet of the surface pine, 10,144 feet of clapboards, and 8,000 feet of matched ceiling. The surface boards and the ceiling were in existence, and only needed dressing to comply with the order. Whether the clapboards can be deemed to have been in existence may be more doubtful. If a part of the order is within the statute of frauds, and a portion of it without it, the whole transaction must be deemed to be within it, as an entire contract cannot, in this case, be divided or apportioned. *Cooke v. Tombs*, 2 Anst. 420 ; *Chater v. Beckett*, 7 T. R. 201 ;

Cooke v. Millard.

Mechelen v. Wallace, 7 A. & E. 49 ; *Thomas v. Williams*, 10 B. & C. 664 ; *Loomis v. Newhall*, 15 Pick. 159. I think it clear that the contract was in its nature entire. It was in evidence that the intention was to buy enough, in connection with what Percival had on hand, to make up a boat load. This could only be accomplished by using the entire amount of the order. Accordingly, even if the contract for the clapboards was not a sale, it cannot be separated from the rest of the order, and the cases above cited are applicable.

The question is thus reduced to the following proposition : Is a contract which is, in form, one of sale of lumber then in existence for a fixed price, where the seller agrees to put it into a state of fitness to fill the order of the purchaser, his work being included in the price, in fact a contract for work and labor and not one of sale, and, accordingly, not within the statute of frauds ?

The New York statute is made applicable to the "sale of any goods, chattels, or things in action," for the price of fifty dollars or more. The words "goods and chattels" are, literally taken, probably more comprehensive than the expressions in the English statute, "goods, wares and merchandise." It will be assumed, however, in this discussion, that they are equivalent.

There are, at least, three distinct views as to the meaning of the words in the statute. These may be called, for the sake of convenience, the English, the Massachusetts and the New York rules, as representing the decisions in the respective courts.

The English rule lays especial stress upon the point, whether the articles bargained for can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which at the time of the delivery could be the subject of sale by him, the case is within the statute of frauds. The rule excludes all cases where work is done upon the goods of another, or even materials supplied or added to the goods of another. Thus, if a carriage-maker should repair my carriage, both furnishing labor and supplying materials, it would be a contract for work and labor, as the whole result of his efforts would not produce a chattel which could be the subject of sale *by him*. If, on the other hand, by the contract he lays out work or materials, or both, so as to produce a chattel which he could sell to me, the contract is within the statute. This conclusion has been reached only after great discussion and

much fluctuation of opinion, but must now be regarded as settled. The leading case upon this point is *Lee v. Griffin*, 1 Best & Smith, 272; Benjamin on Sales, 77. The action was there brought by a dentist to recover twenty-one pounds sterling for two sets of artificial teeth, made for a deceased lady of whose estate the defendant was executor. The court held this to be the sale of a chattel within the statute of frauds. BLACKBURN, J., stated the principle of the decision in a clear manner: "If the contract be such *that it will result in the sale of a chattel*, then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be any thing which could properly be said to be the subject of sale, the action is for work and labor."

The Massachusetts rule, as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can, *at the time stipulated for delivery*, be regarded as "*goods, wares and merchandise*," in the sense of being generally marketable commodities, made by the manufacturer. In that respect it agrees with the English rule. The test is not the non-existence of the commodity at the time of the bargain. It is, rather, whether the manufacturer produces the article in the general course of his business or as the result of a special order. *Goddard v. Binney*, 115 Mass. 450; S. C., 15 Am. Rep. 112. In this very recent case, the result of their decisions is stated in the following terms: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." Under this rule, it was held in *Gardner v. Joy*, 9 Metc. 177, that a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale. On the other hand, in *Goddard v. Binney*, *supra*, the contract with a carriage manufacturer was, that he should make a buggy for the person ordering it, that the color of the lining should be drab, and the outside seat of cane, and have on it the monogram and initials of the party for whom it was made. This was held not to be a con-

Cooke v. Millard.

tract of sale within the statute. See, also, *Mixer v. Howarth*, 21 Pick. 205; *Lamb v. Crafts*, 12 Metc. 353; *Spencer v. Cone*, 1 id. 238.

The New York rule is still different. It is held here by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word *sale*. There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court. *Parsons v. Loucks*, 48 N. Y. 17, 19; S. C., 8 Am. Rep. 517. The contract between *Parsons v. Loucks*, in this State, on the one hand, and *Lee v. Griffin*, *supra*, in England, on the other, is, that in the former case the word *sale* refers to the time of entering into the contract, while in the latter, reference is had to the time of the delivery, as contemplated by the parties. If at that time it is a chattel, it is enough according to the English rule. Other cases in this State agreeing with *Parsons v. Loucks*, are *Crookshank v. Burrel*, 18 Johns. 58; *Sewall v. Fitch*, 8 Cow. 215; *Robertson v. Vaughn*, 5 Sandf. S. C. 1; *Parker v. Schenck*, 28 Barb. 38. These cases are based on certain old decisions in England, such as *Towers v. Osborne*, 1 Strange, 506, and *Clayton v. Andrews*, 4 Burr. 2101, which have been wholly discarded in that country.

The case at bar does not fall within the rule in *Parsons v. Loucks*. The facts of that case were, that a manufacturer agreed to make for the other party to the contract two tons of book paper. The paper was not in existence, and so far as it appears, not even the rags, "except so far as such existence may be argued from the fact that matter is indestructible." So in *Sewall v. Fitch*, *supra*, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser—dressed and put in a condition to fill his order. The court, accordingly, is not hampered in the disposition of this cause by authority, but may proceed upon principle.

Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted

than that enunciated in *Lee v. Griffin*. It is at once so philosophical, and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this State. So far as authoritative decisions have gone, they must be respected even at the expense of sound principle. The court, however, in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this State is, that when the chattel is in existence, so as not to be governed by *Parsons v. Loucks, supra*, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will, however, readily be classified. If, on further discussion, the rule in *Lee v. Griffin* should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the legislature.

The view that this case is one of sale is sustained by *Smith v. The Central Railroad Company*, 4 Keyes, 180 ; S. C., 4 Abb. App. Dec. 262 ; and by *Downs & Skillinger v. Ross*, 23 Wend. 270.

In the first of these cases, there was a contract for the sale and delivery of a quantity of wood, to be cut from trees standing on the plaintiff's land. The court held that it could not be treated as an agreement for work and labor in manufacturing fire-wood out of standing trees. The cases already cited were distinguished in the fact that no change in the thing sold and to be delivered was contemplated, and that the transaction could be regarded as a sale in perfect consistency with the cases which hold that where the substance of the contract consists in the act of converting materials into a new and wholly different article, it is an agreement for work and labor. It was further considered that the case of *Towers v. Osborne*, 1 Strange, 506, where an agreement for the manufacture of a chariot was a contract for work and labor, was extreme in its nature, and was not to be carried any further. P. 200. The cases of *Garbutt v. Watson*, 5 B. & A. 613, and *Smith v. Surman*,

Cooke v. Millard.

9 B. & C. 561, were cited with approval. In *Garbutt v. Watson*, a sale of flour by a miller was held within the statute, although not ground when the bargain was made.

In *Downs, etc., v. Ross*, there was a contract for the sale of 750 bushels of wheat, 250 of the quantity being in a granary, and the residue unthreshed, but which the vendor agreed to get ready and deliver. The court held the contract to be within the statute of frauds, notwithstanding that the act of threshing was to be done by the vendor. The rule that governed the court was, that if the thing sold exist at the time *in solido*, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute. P. 272. This proposition is in marked contrast to the view expressed by COWEN, J., in a dissenting opinion. His theory was, that where the article which forms the subject of sale is understood by the parties to be defective in any particular which demands the finishing labor of the vendor in order to satisfy the bargain, it is a contract for work and labor, and not of sale. These two theories (where the goods exist at the time of sale) have nowhere been more tersely and distinctly stated than in the conflicting opinions of BRONSON and COWEN, JJ., in this case. See, also, *Courtright v. Stewart*, 19 Barb. 455.

The fallacy in the proposition of COWEN, J., is in assuming that there is any “*work and labor*” done for the vendee. All the work and labor is done on the vendor’s property to put it in a condition to enable him to sell it. His compensation for it is found in the price of the goods sold. It is a juggle of words to call this “a mixed contract of sale, and work and labor.” When the goods leave the vendor’s hands and pass over to the vendee, they pass as chattels under an executed contract of sale. While any thing remained to be done the contract was executory. There is abundance of authority for maintaining that a contract in its origin executory may, by the performance of acts under its terms, by one of the parties, become, in the end, executed. *Rohde v. Thwaites*, 3 B. & C. 388; Benjamin on Sales, ch. 5, and cases cited.

The cases of *Donovan v. Wilson*, 26 Barb. 138, and *Parker v. Schenck*, 28 id. 38, are to be upheld as falling within the principle of *Parsons v. Loucks, supra*. Both of these cases concerned articles not in existence, but to be produced by the manufacturer; in one case beer was to be manufactured, and in the other a brass pump.

So in *Passaic Manufacturing Company*, 3 Daly, 495, the contract was for the manufacture and delivery of fifty warps. None of these cases were in existence when the order was received. While the case appears to fall within the rule of *Parsons v. Loucks*, the eminent judge who wrote an elaborate opinion expressing the views of the court, would seem to rely upon the Massachusetts rule rather than our own. Whatever view might be entertained of the soundness of that distinction it is now too late to adopt it here, and the case cannot be sustained on that ground.

The only case in our reports appearing to stand in the way of the conclusion arrived at in this cause is *Mead v. Case*, 33 Barb. 202. The court in that case recognized the distinction herein upheld. The only doubt about the case is, whether the court correctly applied the rule to the facts. These were that several pieces of marble put together in the form of a monument were standing in the yard of a marble cutter. That person agreed with a buyer to polish, letter and finish the article as a monument, and to dispose of it for an entire price—\$200. The court held that there was no *monument in existence* at the time of the bargain. There were pieces of stone in the similitude of a monument, and that was all.

It is unnecessary to quarrel with this case. If unsound, it is only a case of misapplication of an established rule. If sound, it is a so-called "border case," showing the refinements which are likely to arise in applying to various transactions the rule adopted in *Sewall v. Fitch*, and kindred cases. It is proper, however, to say that the notion that such an arrangement of marble placed in a cemetery over a grave cannot be regarded as a monument, in the absence of an inscription, seems highly strained. Then there could not be a memorial church without an inscription. Then it could not have been said of Sir Christopher Wren, in his relation to one of his great architectural productions, "*Si quæris monumentum, circumspice*." It would seem to be enough if the monument reminds the passer-by of him whom it is intended to commemorate, and this might be by tradition, inscriptions on adjoining or neighboring objects, or otherwise.

In the view of these principles, the defendants had the right to set up the statute of frauds. I think that this was so, even as to the clapboards. Although not strictly in existence as clapboards, they fall within the rule in *Smith v. Central Railroad Company*

Cooke v. Millard.

They were no more new products than was the wood in that case. There was simply to be gone through with a process of dividing and adapting existing materials to the plaintiffs' use. It would be difficult to distinguish between splitting planks into clapboards and trees into wood. No especial skill is required, as all the work is done by machinery in general use, and readily managed by any producers of ordinary intelligence. The case bears no resemblance to that of *Parsons v. Loucks*, where the product was to be created from materials in no respect existing in the form of paper. The cases would have been more analogous had the contract in that case been to divide large sheets of paper into small ones, or to make packages of envelopes from existing paper. In *Gilman v. Hill*, 36 N. H. 311, it was held that a contract for sheep pelts to be taken from sheep was a contract for things in existence and a sale.

The next inquiry is, whether there have been sufficient acts done on the part of the buyers to comply with the statute. In order to properly solve this question, it is necessary to look more closely into the nature of the contract. As has been already suggested, the contract was in its origin executory. It called for selection on the part of the sellers from a mass of materials. At the time of the bargain there was no sale. There was at most only an agreement to sell. The plaintiffs, however, lay much stress on the fact that *after* the oral bargain and after the defendants had inspected the lumber, they gave directions, also oral, to the plaintiffs to place the lumber after it had been made ready for delivery upon the dock, and to give notice to Percival. They urge that the subsequent compliance with these directions by the plaintiffs satisfy the terms of the statute.

It will be observed that all of these directions were given while the contract was still wholly executory, and before any act of selection had been performed by the plaintiffs. It will thus be necessary to consider whether these directions are sufficient to turn the executory contract of sale into an executed one, independent of the statute of frauds, and afterward to inquire whether there was any sufficient evidence of "an acceptance and receipt" of the goods to take the case out of the statute. These questions are quite distinct in their nature and governed by different considerations: 1. If the contract had been for goods less than fifty dollars in value, or for more than that amount, and ordered by the defendants in

writing, it would still have been executory in its nature, and would have passed no specific goods. It would have been an agreement to sell and not a sale. The case would not have fallen within such authorities as *Crofoot v. Bennett*, 2 N. Y. 258; and *Kimberly v. Patchin*, 19 id. 330. Since the goods could not have been identified at all, except by the act of the seller in selecting such as would comply with the order, nor could the purposes of the contract have been performed except by the labor of the plaintiffs in adapting the goods to the defendants' use, the case falls within a rule laid down by Mr. Blackburn in his work on Sales, pp. 151, 152: "Where, by the agreement, the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is sometimes worded, into a deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." *Acraman v. Morrice*, 8 C. B. 449; *Gillett v. Hill*, 2 C. & M. 530; *Campbell v. Mersey Docks Company*, 14 C. B. (N. S.) 412.

Proceeding on the view that this was an executory contract, it might still pass into the class of executed sales by acts "of subsequent appropriation." In other words, if the subsequent acts of the seller, combined with evidence of intention on the part of the buyer, show that specific articles have been set apart in performance of the contract, there may be an executed sale and the property in the goods may pass to the purchaser. Blackburn on Sales, 128; Benjamin on Sales, ch. 5; *Fragano v. Long*, 4 B. & C. 219; *Rohde v. Thwaites*, 6 id. 388; *Aldridge v. Johnson*, 7 E. & B. 885; *Calcutta Company v. De Mattos*, 33 L. J. (Q. B.) 214, in Exch. Cham. This doctrine requires the assent of both parties, though it is held that it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection. The vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him. *Browne v. Hare*, 3 H. & N. 484; S. C., 4 id. 822. This doctrine would be applicable to existing chattels where a mere selection from a mass of the same kind was requisite. On the other hand, if the goods are to be manufactured according to

Cooke v. Millard.

an order it would seem that the mind of the purchaser, after the manufacture was complete, should act upon the question whether the goods had complied with the contract. See *Mucklow v. Mangles*, 1 Taunt. 318; *Bishop v. Crawshaw*, 3 B. & C. 415; *Atkinson v. Bell*, 8 id. 277. This point may be illustrated by the case of a sale by sample, where the seller agrees to select from a mass of products, certain items corresponding with the sample, and forward them to a purchaser. The act of selection by the vendor will not pass the title, for the plain and satisfactory reason that the purchaser has still remaining a right to determine whether the selected goods correspond with the sample. *Jenner v. Smith*, Law Rep., 4 C. P. 270. In this case the plaintiff at a fair orally contracted to sell to the defendant two pockets of hops, and also two other pockets to correspond with a sample, which were lying in a warehouse in London, and which he was to forward. On his return to London, he selected two out of three pockets which he had there, and directed them to be marked to "wait the buyer's order." The buyer did not act to show his acceptance of the goods. The court held, that the appropriation was neither originally authorized nor subsequently assented to by the buyer, and that the property did not pass by the contract. BRETT, J., put in a strong form the objection to the view that the buyer could have impliedly assented to the appropriation by the seller. It was urged, he said, "that there was evidence that by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed." P. 278. The same general principle was maintained in *Kein v. Tupper*, 52 N. Y. 550, where it was held, that the act of the vendor putting the goods in a state to be delivered did not pass the title, so long as the acceptance of the vendee, provided for under the terms of the contract, had not been obtained.

The result is, that if this sale, executory as it was in its nature, had not fallen within the statute of frauds, there would have been no sufficient appropriation by the vendor to pass the title. The

transaction, so far as it went, was, even at common law, an agreement to sell and not an actual sale.

(2) But even if it be assumed that this would have been an executed contract of sale in its own nature, without reference to the statute of frauds, was there "an acceptance and a receipt" of the goods, or a part of them, by the buyer, so as to satisfy the statute?

The acceptance and receipt are both necessary. The contract is not valid unless the buyer does both. These are two distinct things. There may be an actual receipt without an acceptance, and an acceptance without a receipt. The receipt of the goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. Indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. Black. on Sales, 106; see *Brand v. Focht*, 3 Keyes, 409; *Stone v. Browning*, 51 N. Y. 211.

There are some *dicta*, of various judges, cited by the plaintiffs to the effect that acceptance and receipt are equivalent. Per CROMPTON, J., and COCKBURN, Ch. J., in *Castle v. Swoorder*, 6 H. & N. 832; per EARLE, J., in *Marvin v. Wallis*, 6 E. & B. 726. These remarks cannot be regarded as of any weight, being contrary to the decided current of authority. Indeed, a late and approved writer says: "It may be confidently assumed, however, that the construction which attributes distinct meaning to the two expressions, 'acceptance' and 'actual receipt,' is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in *Smith v. Hudson*," 6 B. & S. 436; Benj. on Sales.

It cannot be conceded that there was any acceptance in the present case by reason of the acts and words occurring between the parties *after* the parol contract, and before the goods were prepared for delivery. There could be no acceptance without the assent of the buyers to the articles in their changed condition, and as adapted to their use. If the case had been one of specific goods to be selected from a mass without any preparation to be made, and nothing to be done by the vendor but merely to select, the matter would have presented a very different aspect. This distinction is well pointed

out by WILLES, J., in *Bog Lead Co. v. Montague*, 10 C. B. (N. S.) 481. In this case, the question turned upon the meaning of the word "acceptance," in another statute, but the court proceeded on the analogies supposed to be derived from the construction of the same word in the statute of frauds. The question was as to what was necessary to constitute an "acceptance" of shares in a mining company, under 19 and 20 Victoria (chap. 47). The court, having likened the case to that of a sale of chattels, said: "It may be that in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to take place before the purchaser has had an opportunity of rejection. In such a case, the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should *follow*, not *precede*, that of the seller. But where the contract is for a specific, ascertained chattel, the reasoning is altogether different. Equally, where the offer to sell and deliver has been first made by the seller and afterward assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterward assented to by the seller, the contract is complete by the assent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel." Pages 489, 490.

This view is confirmed by *Maberley v. Sheppard*, 10 Bing. 99. That was an action for goods sold and delivered, and it was proven that the defendant ordered a wagon to be made for him by the plaintiff, and, *during the progress of the work*, furnished the iron work and sent it to the plaintiff, and sent a man to help the plaintiff in fitting the iron to the wagon, and bought a tilt and sent it to the plaintiff to be put on the wagon. It was insisted, on these facts, that the defendants had exercised such a dominion over the goods sold as amounted to an acceptance. The court, per TINDAL, Ch. J., held that the plaintiff had been rightly nonsuited, because

the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress; so that it still remained in the plaintiff's yard for further work until it was finished. The court added. "If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance." See, also, Benjamin on Sales, ch. 4, and cases cited.

The plaintiffs, in the case at bar, rely much upon the decision in *Morton v. Tibbett*, 15 Ad. & El. (N. S.) 428. They maintain that this case clearly establishes that there may be an acceptance and receipt of goods by a purchaser, within the statute of frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract.

The expressions in *Morton v. Tibbett* are not to be pressed any further than the facts of the case require. The buyer of wheat by sample had sent a carrier to a place named in a verbal contract between him and the seller on August 25th. The wheat was received on board of one of the carrier's lighters for conveyance by canal to Wisbeach, where it arrived on the 28th. In the meantime it had been resold by the buyer, by the same sample, and was returned by the second purchaser because found to be of short weight. The defendant then wrote to the plaintiff on the 30th, also rejecting it for short weight. An action was brought for goods bargained and sold. There was a verdict for plaintiff, with leave to move for a nonsuit. The question for the appellate court was, whether there was any evidence that the defendant had accepted and received the goods so as to render him liable as buyer. The court held that the acceptance under the statute was not an act subsequent to the receipt of the goods, but must precede, or, at least, be contemporaneous with it, and that there might be an acceptance to satisfy the statute, though the purchaser might, on other grounds, disaffirm the contract.

Morton v. Tibbett decides no more than this, viz., that there may be a conditional acceptance. It is as if the purchaser had said: "I take these goods on the supposition that they comply with the contract. I am not bound to decide that point at this moment. If, on examination, they do not correspond with the sample, I shall

still return them under my common-law right, growing out of the very nature of the contract, to declare it void, because our minds never met on its subject-matter *non in hæc fœdera veni*." It is not necessary to decide whether this distinction is sound. It is enough to say that it is intelligible. The case, in no respect, decides that there can be an acceptance under the statute of frauds without a clear and distinct intent, or that unfinished articles can be presumed to be accepted before they are finished. The act of acceptance was clear and unequivocal. There was a distinct case of intermeddling with the goods in the exercise of an act of ownership—a fact entirely wanting in the case at bar. The proof of acceptance was the act of resale before examination. The point of the decision is, that this was such an exercise of dominion over the goods as is inconsistent with a continuance of the rights of property in the vendor, and, therefore, evidence to justify a jury in finding acceptance as well as actual receipt by the buyer. *Hunt v. Hecht*, 8 Exch. 814.

Even when interpreted in this way, *Morton v. Tibbett* cannot be regarded as absolutely settled law in England. See *Coombs v. Bristol and Exeter Railway Company*, 3 H. & N. 510; *Castle v. Swoorder*, 6 id. 828. The Court of Queen's Bench recognizes it, while the Court of Exchequer has not received it with favor. Later cases distinctly hold that the acceptance must take place after an opportunity by the vendee to exercise an option, or after the doing of some act waiving it. BRAMWELL, B., said, in *Coombs v. The Bristol and Exeter Railway Company*: "The cases establish that there can be no acceptance where there can be no opportunity for rejecting." All the cases were reviewed in *Smith v. Hudson*, 6 Best & Smith, 431, A. D. 1865, where *Hunt v. Hecht* was approved. The two last cited cases disclose a principle applicable to the case at bar.

In *Hunt v. Hecht* the defendant went to the plaintiff's warehouse and there inspected a heap of ox bones, mixed with others inferior in quality. The defendant verbally agreed to purchase those of the better quality, which were to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the ninth and examined next day by the defendant, and he at once refused to accept them. There was held to be no acceptance. The case was put upon the ground that no acceptance was possible till after separation, and there was no pretense of an acceptance

after that time. MARTIN, B., said that an acceptance, to satisfy the statute, must be something more than a mere receipt. It means some act done after the vendee has exercised or had the means of exercising his right of rejection.

In *Smith v. Hudson, supra*, barley was sold on November 3, 1863, by sample, by an oral contract. On the seventh it was taken by the seller to a railway station, where he had delivered grain to the purchaser on several prior dealings, and where it was his custom to receive it from other sellers. The barley was left at the freight-house of the railway, consigned to the order of the purchaser. It was the custom of the trade for the buyer to compare the sample with the bulk as delivered, and if the examination was not satisfactory, to reject it. This right continued in the present case, notwithstanding the delivery of the grain to the railway company. On the ninth the purchaser became bankrupt, and on the eleventh the seller notified the station master not to deliver the barley to the purchaser or his assignees. The court held that there was no *acceptance* sufficient to satisfy the statute. The most that could be said was, that the delivery to the company, considered as an agent of the buyer, was a *receipt*. It could not be claimed that it was an acceptance, the carrier having no implied authority to accept. The buyer had a right to see whether the bulk was according to the sample, and until he had exercised that right there was no acceptance. Opinion of COOKBURN, Ch. J., 446; see, also, *Caulkins v. Hellman*, 47 N. Y. 449; *Halterline v. Rice*, 62 Barb. 593; *Edwards v. Grand Trunk Railway Co.*, 48 Me. 37; S. C., 54 id. 111.

The case at bar only differs from these cases in the immaterial fact that the defendants, after the verbal contract was made, gave verbal directions as to the disposition which should be made of the goods after they were put into a condition ready for delivery. All that subsequently passed between them was mere words, and had not the slightest tendency to show a waiver of the right to examine the goods to see if they corresponded with the contract. Whatever effect these words might have had in indicating an acceptance, if the goods had been specific and ascertained at the time of the directions (see *Cusack v. Robinson*, 7 Lond. Jurist [N. S.], 542), they were without significance under the circumstances, as the meeting of the minds of the parties upon the subject to be selected was necessary. *Shepherd v. Prassey*, 32 N. H. 57. In this case

Dennis v. Ryan.

the effect of subsequent engagements by the buyer was passed upon as to their tendency to show a receipt of the goods by him. The court said: "As mere words constituting a part of the original contract do not constitute an acceptance, so we are of opinion that mere words after words used, looking to the future, to acts afterward done by the buyer toward carrying out the contract, do not constitute an acceptance or prove the actual receipt required by the statute." The case was stronger than that under discussion, as the goods were specific and fully set apart for the purchaser at the time of the subsequent conversations. No distinction is perceived between future acts to be done by the buyer and by the seller, as both equally derive their force from the buyer's assent.

I see no reason in the case at bar to hold that the defendants *received* the goods, independent of the matter of acceptance. There was no evidence that Percival became their agent for this purpose. The most that can be said is, that they promised the plaintiffs that they would make Percival their agent. This promise being oral and connected with the sale, is not binding. They did not, in fact, communicate with him, nor did he assume any dominion or control over the property. The promissory representations of the plaintiffs are clearly within the rule in *Shepherd v. Pressey, supra*.

The whole case falls within the doctrine in *Shindler v. Houston*, 1 N. Y. 261, there being no sufficient act of the parties amounting to transfer of the possession of the lumber to the buyer and acceptance by him.

The judgment of the court below should be affirmed.

All concur.

Judgment affirmed.

DENNIS v. RYAN, appellant.

(65 N. Y. 385.)

Malicious prosecution — liability for procuring one to be indicted on charges not constituting a crime.

A falsely and maliciously stated to the prosecuting attorney that B had committed certain acts which the prosecuting attorney decided to constitute a crime, and thereupon caused B to be indicted upon A's testimony. B was acquitted upon the ground that the facts alleged did not constitute the crime charged. *Held*, that A was liable to B for malicious prosecution. (See note, p. 639.)

ACTION for malicious prosecution in falsely and maliciously charging plaintiff with, and causing him to be indicted and tried for, the crime of forgery. The facts as developed upon the trial were as follows: The defendant, Charles Ryan, went to the district attorney of Cayuga county and charged the plaintiff and one William Dennis with erasing indorsements of a payment made upon a bond conditioned for the payment of money; the district attorney gave it as his opinion that this erasure constituted the crime of forgery. The district attorney caused defendant to be subpoenaed before the grand jury. He appeared and testified, and plaintiff was indicted. It was set forth in the indictment, in substance, that plaintiff and William Dennis, knowingly, designedly and feloniously altered the bond by erasing therefrom the indorsement, with intent to defraud and cheat the obligor and defendant, who had assumed and agreed to pay said bond. Plaintiff was arrested and tried upon the indorsement. Defendant was sworn upon the trial. The court directed a verdict of not guilty upon the ground that the erasure of the indorsement would not constitute the crime of forgery; a verdict was rendered accordingly. Upon the trial of this action the court charged, in substance, that the action could not be maintained unless they were satisfied that the accusation made by defendant, on which the indictment was found, was known by him to be false and unfounded; but that if defendant made this complaint to the district attorney, knowing that it was false and unfounded, and by that means procured plaintiff to be indicted and brought to trial, the action would lie, even though the charge made did not constitute the crime alleged, or any crime. The jury returned a verdict for the plaintiff, and the judgment entered thereon was affirmed by the General Term of the Supreme Court. Defendant appealed.

H. V. Howland, for appellant. No crime was imputed or charged by the facts or circumstances, or given before the grand jury. *State v. Thornburg*, 6 Ired. 79; *State v. McLeren*, 1 Aiken, 311; *State v. Norton*, 3 Zab. 33. Defendant cannot be made liable for a malicious prosecution. *McNeely v. Driskill*, 2 Blackf. 259; *Leigh v. Webb*, 3 Esp. 165; *Blunt v. Little*, 3 Mass. 102; *Murray v. McLane*, 2 Car. L. R. 186 (3 Abb. Nat. Dig. 244). The court erred in denying the motion for a nonsuit. *Foshay v. Ferguson*, 2 Den. 617, 619; 3 Wash. C. C. 37; *Miller v. Milli-*

Dennis v. Ryan.

gan, 48 Barb. 40 ; *Besson v. Southard*, 6 Seld. 236 ; *Hall v. Suydam*, 6 Barb. 86 ; *Vanderbilt v. Mathis*, 5 Duer, 304 ; *Baldwin v. Weed*, 17 Wend. 224 ; *Scott v. Simpson*, 1 Sand. 601 ; 3 Esp. 7 ; 9 East, 261 ; 6 N. Y. 240.

F. D. Wright, for respondent. It was immaterial whether plaintiff could have been punished under the indictment. 1 Arch. Cr. Pr. and Pl. (7th ed.) 1410 ; *Collins v. Love*, 7 Blackf. (Ind.) 416. Defendant was liable for malicious prosecution. 1 Arch. Cr. Pr. and Pl. (7th ed.) 475 ; 1 Hill. on Torts, 470 ; *Forrest v. Collier*, 20 Ala. 170 ; *Collins v. Love*, 7 Blackf. 416 ; *Wicks v. Fentham*, 4 T. R. 247 ; *Hays v. Younglove*, 7 B. Monr. 545 ; *Goslin v. Wilcock*, 2 Wils. 302 ; *Chambers v. Robinson*, 1 Stra. 691 ; *Pedro v. Barrett*, 1 Ld. Raym. 81 ; *Morris v. Scott*, 21 Wend. 281 ; 1 Am. Cr. Cas. 208, 209.

GRAY, C. In all that pertained to the criminal prosecution of the plaintiff, the defendant was as much the complainant and prosecutor as if he had, unbidden by legal process, appeared before the grand jury and made the complaint upon which the indictment was found. He knew the district attorney to be a law officer of the county, whose duty it was to prosecute for such criminal offenses as had been committed within its limits ; he appeared before him and related his made-up and malicious story which, if true, constituted, in the opinion of that officer, a criminal offense. The result was that the district attorney, confiding in the truth of his statement, and, as in duty bound, caused him to be subpoenaed to appear before the grand jury and testify as to the matter of which he had complained ; he appeared, testified, and the indictment followed. That he was the complainant was not questioned on the trial, nor is it raised by the appellant here. The crime charged was forgery ; it was alleged and stated in the indictment to consist of an erasure of an indorsement of payment upon a bond. This, it is insisted on the part of the defendant, did not constitute the crime of forgery, and I am inclined to think it did not ; and because, as the defendant insists, it did not, he claims that however false his accusation was, or with whatever evil or malicious intent he instigated the prosecution, and however much it may have vexed and injured the plaintiff, he is not liable in this action, and the reason assigned, in substance, is, that it was through the misjudgment of the district attorney and the grand

jury that the indictment was found, a warrant issued, the plaintiff arrested and put upon his defense. I do not doubt that, if the defendant's statement to the district attorney and the grand jury had been true, and that an indictment had been found and prosecuted upon his truthful statement, this action could not have been maintained ; in such case, the defendant would not have been guilty of any wrong. The oppression of the plaintiff would have been attributable alone to the erroneous legal conclusions of the district attorney and grand jury. Such, in effect, was the case of *Leigh v. Webb*, 3 Esp. 165 ; *McNeely v. Driskill*, 2 Blackf. 259, and *Bennett v. Black*, 2 Ala. (1 Stew.) 494, and other cases which might be cited, and in not one of all of them which have fallen under my observation does it appear that the complaint was not honest and truthful, and that the injury was the result alone of a judicial error. Subsequent to the cases of *McNeely v. Driskill* and of *Bennett v. Black*, a case arose in the courts of the respective States of Indiana and Alabama which, in principle, uphold this action. In the former, a count for malicious prosecution was held good, although the charge upon which the prosecution was made did not authorize issuing the warrant. *Collins v. Love*, 7 Blackf. 416. In the latter, it was held that in an action for maliciously suing out an attachment, the defendant could not raise the objection that the affidavit made was insufficient to authorize issuing it. *Forrest v. Collier*, 20 Ala. 175. And in *Anderson v. Buchanan, Wright* (Ohio), 725, it was held that although the charge made did not constitute a crime, yet, as it was false and malicious, it did not lay with the defendant to raise that objection. *Farlie v. Danks*, 30 Eng. Law & Eq. 115. Lord CAMPBELL, Ch. J., in delivering the opinion of the court in a case not distinguishable in principle from the one under consideration, said : " I think all that is necessary is that the defendant should falsely and maliciously cause the act to be done ; and he did cause it, because, if he had not presented his petition and made a false affidavit, the judge could not and would not have made the adjudication. I should have been surprised and grieved to find any decision of our courts that the action was not maintainable. There is no doubt that if a person truly states to a judge, and the judge thereupon does an act which the law will not justify, the party who made the statement is not liable, because, in that case, the grievance complained of arises not

Dennis v. Ryan.

from the false statement of the party but from a mistake of the judge. It would be strange if, where a court is put in motion by a false and malicious statement, it should depend upon a nice question of law whether there was a remedy or not." A case has arisen in our own courts in which a party falsely and maliciously prosecuted another for a crime, before a court having no jurisdiction of the offense, and he was held liable in an action for malicious prosecution, upon the ground that falsehood and malice united was the *gravamen* of the action; that "the sting of all this kind of actions is malice and falsehood and the injury resulting therefrom." *Morris v. Scott*, 21 Wend. 281. That the plaintiff was, upon the complaint of the defendant, prosecuted, is not denied; that the complaint was false and maliciously made is established by the verdict of the jury, and now that he has put in motion the officers of the law, and by his false and malicious statement it does not, either upon principle or authority, lay with him to say by way of defense that the injury resulting from the wrong committed by him would not have been consummated but for the innocent mistake of those imposed upon by him.

The judgment appealed from should be affirmed.

Judgment affirmed.

LOTT, Ch. C., and DWIGHT, C., delivered dissenting opinions.

NOTE.—The following is the dissenting opinion of Mr. Commissioner DWIGHT, which is valuable because of its elaborate review of the cases:

"The real inquiry in such a case is, what is the true cause of injury to the plaintiff? Is it the false statement of facts, or the carelessness or unskillfulness of the prosecuting officer? Assume that the present defendant had falsely stated facts which, if true, were the basis of a civil action, would he have been liable upon that statement for the result of an indictment? A man might be falsely charged with a breach of promise of marriage, accompanied with seduction. If the woman and other witnesses had falsely stated to the district attorney facts showing the promise to marry, its breach and indecent familiarities not amounting to seduction, and on this statement an indictment had been found, could the woman be said to have maliciously prosecuted a criminal charge, upon facts showing that at most only a civil action for damages would lie? I think not.

"The principle governing this case appears to be settled by *Leigh v. Webb*, 8 Esp. N. P. 165, before Lord ELDON, then chief justice of the Common Pleas. This was an action for malicious prosecution based upon the following state of facts: The plaintiff was a publican, and dealt with the defendant as his brewer, and certain casks containing ale had been sent into the plaintiff's house. When they became empty they were sent to the house of a third person. The defendant, on this state of facts, procured a warrant from magistrates under which the plaintiff was taken into custody. The plaintiff on this showing was

Dennis v. Ryan.

nonsuited. Lord ELDON said: 'The plaintiff, in every count of his declaration except the first, complains that the defendant imposed the charge of felony upon him, and that count varies from the information on which the magistrate issued his warrant. Does the evidence correspond with the case the plaintiff has put upon the record? There is no charge of felony contained in the information; it contains a state of facts certainly not amounting to felony, but for which an action of trover could be maintained. The defendant having lost his property, states the facts to the magistrate, upon which he is to form his judgment. If the highest criminal judge of the land was, by mistake of judgment, to conceive that to be a felony which did not amount to that offense, and to commit the party complained against, would that subject the party complaining to an action of this sort? I am of opinion that it ought not, and that the plaintiff must be nonsuited.'

"It is true that this is a *nisi prius* case, but it was decided by a distinguished judge, and seems beyond question to be correctly decided. It differs from the case at bar in the fact that there was no false statement of facts. That, however, is immaterial under the reasoning of the court. The point of the decision is, that the true cause of the imprisonment is the error of the magistrate, and this is the same whether the facts are real or simulated. It seems to me that the correct rule is, that to make the person who presents the charge liable, the facts, as he states them, must be sufficient to constitute a crime. If that were the case, it may plausibly be maintained that he has set in motion the proceeding, even though the prosecuting officer drew the indictment imperfectly or managed the prosecution so languidly or inefficiently that no conviction could be secured.

"It has been held in some of the earlier cases, that an action for malicious prosecution may be maintained, though the warrant or indictment were legally defective, and the plaintiff never could have been convicted, 'for the disgrace, injury, trouble and expense are the same under a bad indictment as under a good one.' *Jones v. Gwynn*, 10 Mod. 214; *Chambers v. Robinson*, 1 Strange, 691; *Wicks v. Fentham*, 4 T. R. 247; *Pippet v. Hearn*, 5 Barn. & Ald. 684. None of these cases affect the disposition of the case at bar. They proceed upon the supposition that the defendant stated facts to the grand jury amounting to a crime, but the indictment was defectively drawn. Thus, in *Pippet v. Hearn*, the court said: 'We are of the opinion that where a man maliciously prefers, an indictment against another for a crime, he is liable to an action, although the indictment be defective.' On the other hand, the principle in *Leigh v. Webb* is approved in Addison on Torts, and followed in 1 American Leading Cases, 208, 209. It is there said, if a person state facts to a magistrate truly, which do not amount to a felony, or constitute a different felony, and the magistrate, of his own motion, erroneously issue a warrant for felony, or for another felony from that stated, the person is not liable to an action for malicious prosecution. Citing *Heyward v. Cuthbert*, 4 McCord, 354; *McNeely v. Driskill*, 2 Blackf. 259; *Bennett v. Black*, 2 Ala. (1 Stewart) 495. And if one be sworn before the grand jury to facts not amounting to a felony, and the jury find a felony, he is not responsible for the indictment.'

"In *Bennett v. Black*, *supra*, the court said: 'We are of opinion that if a justice of the peace or any other judicial officer to whom application may be made for a warrant for the apprehension of offenders against the criminal law, was by mistake of judgment to conceive that to be a felony which, from the facts sworn to, did not amount to that offense, and should the party complained against be committed to jail, it would not subject the party complain-

Dennis v. Ryan.

ing to an action of this sort (malicious prosecution). If it would, it would subject every prosecutor to an action for the mistakes of the criminal judge, which is too unreasonable to be admitted.'

"In *McNeely v. Driskill*, 2 Blackf. 259, A made an affidavit before a justice of the peace, stating that he had lost certain goods, which he believed were concealed in the possession of B. The justice thereupon issued a warrant against B for larceny. B was arrested on the warrant and afterward acquitted. It was held that A's statement contained no criminal charge, and that he was, therefore, not liable to B in an action for criminal prosecution. The court said: 'This action is brought for wrongfully and maliciously prosecuting the appellee on a charge for larceny. The affidavit shows a state of facts on which an action of trover might have been maintained, but it contains no charge of larceny against any person. The appellant had lost his property and wished to recover it. He states that fact to a justice of the peace. The justice forms his judgment upon the facts stated, and issues his mandate to an officer to search for the property, and to bring the person in whose possession it may be found before himself or some other justice of the peace. This was an error, but it was an error of the justice and not of the appellant. If a justice of the peace, by a mistake of judgment, conceive an act to be a felony which is not one, and in consequence of that mistake causes an innocent person to be arrested and imprisoned, the law will not hold the person who made the complaint responsible in this form of action for the consequences of such errors.'

"The rule was stated by ROBERTSON, Ch. J., in *Burns v. Erben*, 1 Rob. 559, in the following terms: 'If the facts sworn to by the malicious prosecutor do not furnish *prima facie* grounds to infer that a crime has been committed, only the magistrate issuing the warrant is liable.' These cases must of course maintain that no action will lie though malice on the part of the prosecutor exists, since without that ingredient no action for malicious prosecution is ever sustainable.

"In *Cohen v. Morgan*, 6 Dowl. & Ryl. 8, it appeared that the defendant had lost a bill of exchange which he supposed had been stolen. He went before a magistrate and related the facts and circumstances of the loss. The magistrate granted this warrant to apprehend A B, on a charge of having '*feloniously stolen, taken and carried away the bill of exchange,*' language which the defendant did not use when he laid his information. On subsequent investigation of the case it turned out to be no felony. It was held that an action on the case would not lie for maliciously procuring the magistrate to grant his warrant. The court, per Lord TENTERDEN, said that it was for the justice, after the defendant had related the facts and circumstances of the loss, to say whether those facts amounted to a felony, to determine whether he would or would not issue his warrant to apprehend the party accused. After the defendant had related the facts of the case, the justice's clerk, instead of writing down what the man really said, wrote down what he took to be the fact as mere matter of assumption. The defendant never used the words '*feloniously stolen, taken and carried away,*' as it would appear that he did, judging by the language of the information.

"In *Carratt v. Morley*, 1 Gale & Davison, 275, a similar rule was laid down in an action for trespass. An action was there brought against Morley, one of the defendants, to recover damages for false imprisonment of the plaintiff. It was shown that Morley appeared before the commissioners of an inferior court who had jurisdiction to try cases of debt where the debtor resided within

a certain district. He stated his case to the court, and the commissioners entertained a claim against a person, whom Morley's statement showed did not come within the jurisdiction. It was held that he was not liable. The court, after citing *Cohen v. Morgan*, *supra*, said: 'It is clear from that and other cases and upon principle, that a party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction.' 1 Gale & Dav. 282, 283.

"The principle governing this class of cases is thus stated by GRAY, *arguendo*, in *Farley v. Danks*, 4 Ell. & Black. 497. As his argument was made to show the plaintiff's right to recover in an action for malicious prosecution, and as his reasoning was closely followed by the court in its decision, it goes undoubtedly as far as any case can be found to proceed. He said: 'If a party *falsely and maliciously, and without probable cause*, charged another with a felony, a robbery for instance, he would be liable for a malicious prosecution for felony, though the facts to which he swore did not technically show a robbery. It would, indeed, be otherwise, if he simply stated the facts, and did not suggest that there was a robbery. That was the principle of *Leigh v. Webb*, 3 Esp. 165, and *Milton v. Elmore*, 4 C. & P. 456.' Here the counsel for the plaintiff assumes that all the ingredients of an action for malicious prosecution exist, viz., malice, falsity and want of probable cause, and yet concedes that an action is not maintainable against one who simply makes a statement, without any suggestion that a crime has been committed.

"In *Tempest v. Chambers*, 1 Starke, 55, one count in a declaration was for maliciously, and without probable cause, procuring the plaintiff to be arrested on a charge of felony. The allegation was, that the defendant appeared before a magistrate and charged the plaintiff with having *feloniously* taken away a pair of shutters belonging to the defendant. Upon the information being produced, it appeared on the face of the information, that the defendant had charged the plaintiff with having unlawfully taken away a pair of shutters belonging to the plaintiff and having converted the same to his own use. Lord ELLENBOROUGH was of opinion that the variance was fatal, since it appeared that the defendant had not charged the plaintiff with a felony, but with a bare trespass in taking away the shutters, for which no warrant ought to have issued. This case is a clear recognition of the doctrines maintained in the opinion, since, if the mere statement of the facts was the moving cause of the arrest, then the defendant did charge the plaintiff with a felonious theft of the goods.

"The case of *Milton v. Elmore*, 4 Carrington & Payne, 456, is strongly in favor of the defendant. In that case a servant of Elmore stated before a magistrate that Milton came into his employer's (Elmore's) yard and took from a stable there two geldings, the property of Elmore, and rode them away, though he was told that he must not. It was held that this statement did not support a count for malicious prosecution, which alleged that the information charged Milton with having feloniously stolen and ridden away with two geldings. It is plain that in this case, also, if the statement made by the servant was the procuring cause of the arrest, he did, in point of law, charge Milton with having stolen the geldings. The variance was only fatal on the ground that the statement of facts had no natural connection with the magistrate's proceedings.

"Some of the cases which are alleged to be in conflict with these views will now be noticed. One of these is *Farley v. Danks*, *supra*. In this case, the declaration charged, that the defendant *falsely and maliciously, etc.*, filed a

Dennis v. Ryan.

petition for adjudication of bankruptcy against the plaintiff, and caused and procured him to be declared bankrupt. It was held that this charge was sustained by proof, that the defendant petitioned for the adjudication, and by depositions false in fact, and maliciously made, led the commissioner to adjudicate the bankruptcy, though it appeared that, even if the depositions had been true, the adjudication could not have been supported in law. It, however, distinctly appeared in that case that the defendant stated in his petition that he had been informed and believed that plaintiff 'did lately commit an act of bankruptcy, within the true intent and meaning of the act of bankruptcy,' and made affidavit that the allegations in the petition were true. This case steers wide of the one at bar, since there was a *specific allegation of an act of bankruptcy*, and not a mere general statement of facts from which the commissioner of bankruptcy might have drawn his own conclusion. It was on this point that Gray, of counsel for the plaintiff, relied in making the distinction which I have already quoted from him. The language of the court must be construed from this point of view; moreover, it must be considered that in this case the defendant set the proceedings in motion. He made the affidavit and presented it to the commissioner as the basis for some action. In the case at bar, the defendant simply conversed with the district attorney, who, of his own motion, instituted the proceedings. *Furley v. Danks* does not controvert the general principle that the defendant must be the procuring cause of the arrest, but maintains under a state of facts not parallel with those now under discussion, that the defendant did cause the wrongful act.

"*Anderson v. Buchanan*, Wright (Ohio), 726, is not opposed to these views. In that case, Anderson was actively the prosecutor of the charge, and made an affidavit which was claimed to be insufficient in form. The court said: 'The present plaintiff seeks to avoid responsibility for his malicious prosecution of Anderson, on account of the want of technical precision in the preliminary steps which he took to subject him to criminal punishment. He commenced and carried on the criminal charge in his own way, and when defeated would avoid responsibility by alleging his own mistakes. A convenient method of escaping responsibility—which secures a malicious man the opportunity of wreaking his vengeance with impunity, because he so shaped his proceedings that the law would adjudge them insufficient if objected to. In no view can it be a defense to this action, that the proceedings in the criminal prosecution were erroneous.' P. 726. The whole opinion proceeds upon the active interference of Buchanan, the defendant, who alleged in his affidavit perjury. The case thus falls within the rule in *Farley v. Danks*, *supra*, and as has been shown is not parallel with the case at bar.

"*Collins v. Love*, 7 Black, 416, which is very meagerly reported, apparently turns upon the same point. It was a question as to the validity of a pleading. The count is presented in the report in the following terms: 'The defendant, etc., intending, etc., went before a justice, etc., and without, etc., charged the plaintiff, etc., and thereupon falsely, etc., and without, etc., procured the justice to make his warrant, etc.'" It was held that the count was not objectionable, because the alleged charge did not authorize the issuing of the warrant. It will be observed that in this case the defendant was the actor in the proceedings, and must also have *charged the crime* for which the justice issued the warrant. This is the reasonable interpretation of the words 'charged the plaintiff, etc.' It is but another illustration of the rule in *Farley v. Danks*, *supra*.

McCaffrey v. Woodin.

"The case of *Morris v. Scott*, 21 Wend. 281, has been so fully considered by the chief commissioner that it is only necessary for me to say that I concur in his exposition of it, and do not see that it conflicts with the view taken in this opinion. So far as it holds that an action for malicious prosecution will lie where a court has no jurisdiction, it is controverted by *Turpin v. Remy*, 2 Black, 211; *Bixby v. Brundage*, 2 Gray, 129, and 1 American Leading Cases, 208, 209, 4th ed. It cannot be pressed so far as to maintain that an action of trespass will lie against one who merely makes a statement to an officer having no jurisdiction upon which he proceeds to act, without controverting *Carvatt v. Morley*, *supra*, and other cases already considered."

MCCAFFREY v. WOODIN, appellant.

(65 N. Y. 459.)

Mortgage of property not acquired — condition in lease, for lien on crops to be grown.

A lease provided that the lessor should have "a lien as security, for the payment of the rent on all goods, implements, stock, fixtures, tools and other personal property, which may be put on said premises, said lien to be enforced on the non-payment of rent," by taking and sale as in case of a chattel mortgage. Default being made, the lessor seized farm produce and stock and sold it, and the lessee brought an action for conversion. *Held*, that the provision was in substance a chattel mortgage; that, as the property was not then in existence or acquired, it conveyed no present legal title, but was a valid license to enter and seize the property if in existence on default, and that, after such entry and seizure, the title vested in the lessor. *Held*, also, that in equity, the lien would attach and bind the property as soon as acquired. (*See note*, p. 658.)

ACTION of trover. The opinion states the case. The jury found a verdict for the plaintiff, and the General Term affirmed the judgment entered thereon (62 Barb. 316), and defendant appealed.

Joseph H. Stull, for appellant. The court erred in holding that the covenant in the lease as to taking property on default in payment of rent was a mere license. *Jamison v. Milleman*, 3 Duer, 255; *Babcock v. Utter*, 1 Keyes, 115; *Ex parte Coburn*, 1 Cow. 568; *Mumford v. Whitney*, 15 Wend. 380; *Tillotson v. Preston*, 7 Johns. 285; *Simpkins v. Rogers*, 15 Ill. 397; *Woodward v. Seeley*, 11 id. 157; *Wood v. Leadbitter*, 13 M. & W. 838, 844, 845; *Bryan v. Whistler*, 8 B. & C. 288; *Hewlins v. Shipman*, 5 id. 222; 13 M. &

McCaffrey v. Woodin.

W. 845. As between lessee and lessor, a chattel mortgage upon crops to be raised by the lessee on the premises is valid. *Butt v. Elliott*, 19 Wall. 544; *Conderman v. Smith*, 41 Barb. 404; *Andrew v. Newcomb*, 32 N. Y. 417; *Shuart v. Taylor*, 7 How. Pr. 251; *Van Hoozen v. Corey*, 34 Barb. 9.

Edward Harris, for respondent. The lien clause in the lease was not a chattel mortgage. *Milliman v. Neher*, 20 Barb. 37, 40; *Edyell v. Hart*, 5 Seld. 217; *Brownell v. Hawkins*, 4 Barb. 491. If regarded as a chattel mortgage, it was absolutely void. *Conderman v. Smith*, 41 Barb. 404; *Otis v. Sill*, 8 id. 102; *Morrill v. Noyes*, 3 Am. L. Reg. (N. S.) 23. It was invalid, for any purpose, except that within some cases it might be deemed an executory contract for a lien as security for rent, not creating a specific lien, but to be enforced by an equitable action at law. 8 Am. L. Reg. (N. S.) 611; *Otis v. Sill*, 8 Barb. 111; *Van Hoozen v. Corey*, 34 id. 10.

DWIGHT, C. This is an action of trover to recover certain farm stock, a quantity of hay and other farm produce, valued at \$200. The defense is that the defendant took the property by virtue of the following provision in a lease made by Catharine Beahan to the plaintiff, under which he held the farm upon which the crops were grown: "It is agreed that the said party of the first part shall have a lien as security for the payment of the rent aforesaid, on all goods, implements, stock, fixtures, tools and other personal property, which may be put on said premises, and such lien to be enforced on the non-payment of the rent aforesaid, by the taking and sale of such property in the same manner as in cases of chattel mortgage on default thereof." The defendant acted as agent of Mrs. Beahan. The property was taken in default of the payment of rent due by the terms of the lease. It was seized by the defendant on February 2, 1869. Notices of sale were put up, and the hay, oats, cornstalks and straw were sold at auction February 10, 1869, to make \$100, balance of rent accrued. Soon after the 1st of April, 1869, the two horses were advertised for sale, and sold at auction, to make the remaining installment of rent. The plaintiff forbade both sales. The judge, at the trial, refused to submit any question to the jury but that of damages.

The theory of the plaintiff is that the clause in the lease already referred to amounted to no more than a license to take the goods,

and that, having forbidden the sale, the license was countermandable and is at an end. In considering the rights of the parties, it will be proper to investigate the claims of the lessor, Mrs. Beahan, both in law and equity. If it should be found, on examination, that her right to seize and hold the property cannot be recognized in a court of law, still the defendant may, under the Code, urge any equitable defense which he may have to the plaintiff's action. Code, § 150.

I. The most satisfactory mode of considering Mrs. Beahan's right in law is, for the time being, to regard the clause in the lease as purporting to create a chattel mortgage upon property not in existence or not yet acquired. If it should be found to be a valid instrument in that respect, it would then be proper to ascertain whether the clause in question can be regarded as a chattel mortgage, or as equivalent to it.

It must be conceded that if such a transaction as the present had been entered into in the ordinary form of a mortgage, it would not have been an executed contract, but rather executory in its nature. An instrument considered as an assignment will not (at law) pass a title to chattels not in existence, or not in the ownership of the grantor, or not sufficiently appropriated at the time of the assignment. 2 Hilliard on Mortgages, p. 408, § 4. If, however, the instrument be so framed as to give the mortgagee a power of seizing such future chattels of the grantor as they should be acquired by him and brought upon the premises, they will pass, after such seizure, where there is already a foundation of interest in the grantor. This is an old rule in the law, and rests, to some extent, upon a maxim stated by Lord BACON, and quoted by Mr. Broom. The maxim is as follows: "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio procedere quæ suatiatur effectum, interveniente novo actu.*" Mr. Broom's rendering of this maxim is: "Though the grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some new act." He subjoins an illustration of it, quite pertinent to the facts of the case at bar. He says: "For instance, a power contained in an indenture to seize future crops, if unexecuted, would be of no avail against an execution levied, as giving no equitable title to any specific crops, yet if the power be subsequently executed by the grantee taking possession of the then growing crops, the seizure will be good as against

McCaffrey v. Woodin.

an execution afterward levied, for the act done by the grantee is sufficient to give effect to the antecedent declaration." Broom's Leg. Max. 440. The only point to be criticised in this statement is that which sets forth that the assignee of future crops has no equitable title before taking possession. That point will be considered hereafter. But, considered as an enunciation of the rules governing courts of law, Mr. Broom's statement must be regarded as correct.

There is now an abundance of authority for this proposition to be found in *Congreve v. Evetts*, 10 Exch. 298; *Carr v. Allatt*, 2 L. J. Ex. 385; *Hope v. Hayley*, 5 Ell. & Black. 830; *Chidell v. Gadsworthy*, 6 C. B. (N. S.) 471; *Baker v. Gray*, 17 C. B. 462; *Moody v. Wright*, 13 Metc. 29; *Chapman v. Weimar*, 4 Ohio (N. S.), 481; *Chynoweth v. Tenney*, 10 Wis. 397.

In *Congreve v. Evetts*, S. assigned, by indenture, his crops of grain upon his farm, as security for money lent. By the indenture it was declared and agreed that it should be lawful at any time to seize and take possession of the crops and other effects which should or might from time to time be substituted in lieu of the crops thereby assigned, or which should from time to time be found on or about the farm, and the same to sell or dispose of, and out of the proceeds to pay all costs and to retain all moneys due to the plaintiff. On the 21st of February, 1849, a sum of £1,297 being due, the plaintiff seized and took possession of some crops of grain then growing on the farm, and which had been sown by S. subsequently to the execution of the indenture. The sheriff levied an execution the next day, selling the crops for a sum of money, which came into the hands of the defendants, and to recover which the plaintiff brought his action. PARKE, B., in delivering the judgment of the court, said: "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution; it gave no legal or even equitable title to any specific goods, but when executed to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of a chattel by delivery with his own hands or point it out and direct the creditor to take it, or tell him to take any he pleases for the payment of his debt, by the sale of it, the effect, after actual possession by the creditor, is the same." The principle of this case is

re-affirmed in *Carr v. Allatt, supra*. In that case, though the instrument was in the form of a power of attorney rather than of a direct conveyance, it was construed to extend to stock and crops growing on a farm not occupied by the assignor at the time of its execution. *Moody v. Wright, supra*, adopted the principles of these and the other English cases above cited. The language of the Massachusetts court is, the executory agreement of the owner is a *continuing* agreement, so that when the creditor does take possession under it, he acts lawfully, under the agreement of one having the disposing power, and this makes the lien good.

The general idea running through these cases in a court of law appears to be that the executory agreement operates as a license, authority or power, revocable in its nature, until the creditor is either put into possession of the goods at the time or after they come into existence or are vested in the debtor. As soon as *that new act has intervened*, the lien of the creditor becomes perfect, and, in the absence of statutory regulation, prevails over the liens of subsequent executions. While this construction is given to a mere power to seize and hold the chattels as security, it may fairly be argued, that if the additional right is conceded to sell and appropriate the proceeds, the whole effect of the instrument is to constitute a grant, at least in equity. Thus, in *Muskett v. Hill*, 5 Bing. N. C. 694, it was held that a license to search for and raise metals, and also to carry them away, operated not merely as a license but as a grant, and passed an interest to the grantee, which was capable of being assigned by him. See, also, *Wood v. Leadbitter*, 13 M. & W. 838; *Wickham v. Hawker*, 7 id. 63. There is an additional rule which must be referred to as closely bearing upon the case at bar, as far as the ownership of the crops is concerned. It is well settled, that a grant of the future produce of land actually in possession of the grantor at the time of the grant passes an interest in such future crop as soon as it comes into existence. Thus, it was said in *Grantham v. Hawley*, Hobart, 132, "that he that hath land may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant." This principle was fully recognized in a recent case as applicable to the law of landlord and tenant. A tenant for years of a farm, being indebted to his landlord, assigned to him by deed "all his household goods and all his tenant right and interest yet to come and unexpired, in and to the farm and premises." It was held that

McCaffrey v. Woodin.

under this agreement the tenant's interest in crops grown in future years of the term passed to the landlord. *Petch v. Tutin*, 15 M. & W. 110 ; see, also, Broom's Legal Maxims, 442, 5th Am. ed.*

Upon the point whether the present transaction is to be governed by the same rules as though it were in form a chattel mortgage, it is scarcely necessary to spend much time. At law, a mortgage upon property not yet acquired is, according to the authorities, only a license, until a new act intervenes. The present case is certainly a license, and if possession be taken by the creditor, there is as much reason to connect the new intervening act with the authority, as though the instrument were in form a mortgage. Moreover, I think that the instrument is in substance a mortgage. No special form of words is necessary to constitute a mortgage. The statement that the creditor is to have a lien, and that on default he may take possession and sell, in the same manner as in cases of chattel mortgage, sufficiently discloses the intent. The parties intended to enter into a transaction having some effect, and the only way to give it validity is to hold that in substance it has all the characteristics in equity of a mortgage, or of an equitable lien which for the purposes of this case is equivalent. The case of *Carr v. Allatt*, *supra*, shows that but little attention is to be paid to the form of the contract, the great purpose of the court being, as far as possible, to carry out the true and deliberate meaning of the parties, as far as this can be done consistently with the rules of law.

II. Thus far the investigation of this question has been confined to rules prevailing in courts of law. The rule in equity is much less technical and more comprehensive. It was not, however, fully settled until the elaborate discussion in *Holroyd v. Marshall*, 10 House of Lords Cases, 191. The case was twice argued and received great attention, both from counsel and the court. It appeared that one Taylor was the owner of certain machinery in a mill. It was purchased by Holroyd, but not removed by him, Taylor continuing in possession. He, however, executed a deed by which it was declared that the machinery was the property of Holroyd ; that he (Taylor) desired to repurchase it for £5,000, but had not the money to pay for it, wherefore it was conveyed to B

* See, also, *Apperson v. Moore*, 21 Am. Rep. 170 ; 80 Ark. 56 ; *Argues v. Wasson*, 21 Am. Rep. 718 ; 51 Cal. 680 ; but see otherwise as to crops not sown. *Hutchinson v. Ford*, 25 Am. Rep. 711 ; 9 Bush, 318.—AM. REP.

in trust, when Taylor should pay the money to transfer to him, and, if he did not pay, to hold the property for Holroyd. There was a covenant that all the machinery which should be placed in the mill, in addition to or in substitution for the original machinery, should be subject to the same trusts. Taylor sold some of the original machinery, purchased some in addition, *but nothing was done by or on behalf of Holroyd to take possession of the newly-purchased machinery.* On April 2, 1860, Holroyd served Taylor with notice of demand for payment of £5,000. An execution was afterward levied by a creditor. This state of facts distinctly raised the point whether Lord BACON's rule that there must be "some new act intervening" in order to create the lien, prevails in equity. Lord WESTBURY puts the case on the ground that though the contract as to the future-acquired property passed no title, yet that if a vendor or mortgagor agreed to sell or mortgage property of which he is not possessed at the time, and receives a consideration, and afterward become possessed of property answering the description in the contract, that will in equity transfer the beneficial interest to the mortgagee or purchaser immediately out of the property being acquired. His line of argument was that there was a trust imposed on the fund by the force of the contract, and that the incapacity to perform it at the time of its execution is no answer when the means of doing so are afterward obtained. Accordingly, it followed that as soon as the new machinery and effects were placed in the mill, they became subject in equity to the operation of the contract, and passed to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he was in the meantime a trustee of the property in question. Pp. 156, 159. Another member of the court (Lord CHELMSFORD) pointed out with more particularity the distinction between the rule in law and equity. In the former there must be a new intervening act; a mere license is not sufficient unless acted upon. In equity the estate attaches as soon as the property is acquired by the debtor. At law, property not existing, but to be acquired at a future time, is not assignable; in equity it is transferable. At law, though a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken. In equity it is not disputed that the moment the property comes into possession the deed operates upon it. The court reviews certain cases

McCaffrey v. Woodin.

which have sometimes been supposed to be opposed to those doctrines, *e. g.*, *Langton v. Horton*, 1 Hare, 549. It is declared that this case does not impugn the general principle. It admits the transaction to pass the title between the parties, while it departs from the rule in failing to apply it to third parties, as creditors. The *dicta* in *Mogg v. Baker*, 3 M. & W. 198, to the effect that no equitable title passes without "the new intervening act" are disapproved, and Lord WENSLEYDALE, who, as Baron PARKE, wrote the opinion in that case, admits, when participating in the decision in this case (*Holroyd v. Marshall*), that he was mistaken so far as he stated in *Mogg v. Baker* a rule to be applied in equity. This carefully-considered case has undoubtedly settled the law in England. I think it to be entirely correct in principle. It perfectly coincides with the case of *Smithhurst v. Edmunds*, 1 McCarter, 405. In that case it was held that the real question was whether the transaction created an equitable mortgage. It was held that a mortgage of future-acquired property would bind both real and personal estate, when acquired, as to the parties themselves and all persons claiming under them with notice. The same result was reached in *Mitchell v. Winslow*, 2 Story, 639. So in *Rowan v. Sharp Co.*, 29 Conn. 282, and in *Walker v. Vaughan*, 33 id. 577, it was decided that the mortgage would attach to the property when acquired.* There appears to be no well-considered decision in the equity reports to the contrary. There are several *dicta* by judges sitting in courts of law in opposition to those views, but they find no support in the equity tribunals. See remarks in *Otis v. Sill*, 8 Barb. 102. *Gardner v. McEwen*, 19 N. Y. 123, is a case between the mortgagee and creditors, and was affected by our act concerning filing chattel mortgages. *Milliman v. Neher*, 20 Barb. 37, is a case at law, and the rights of creditors were also involved.

The application of these principles to the case at bar can be briefly made. The matter comes up solely between the parties, there being no intervening rights of creditors. The plaintiff bought one horse of Mrs. Beahan before the execution of the lease, and immediately after he took possession put it on the farm. Soon after going into possession he purchased two other horses which

* See, also, *Apperson v. Moore*, 21 Am. Rep. 170; 30 Ark. 56. But not if the mortgagor had only a mere expectancy or possibility of acquiring the property when the mortgage was given; thus a sale of fish thereafter to be caught passes no title to the fish when caught. *Low v. Pew*, 11 Am. Rep. 357; 103 Mass. 347—AM. REP.

were also put on the farm. After an installment of the rent had become due he put a pair of horses in the possession of Dr. Beahan, as agent, saying, "I deliver them to you as Mrs. Beahan's agent." This was enough to make out the new intervening act required by Lord BACON's rule. The fact that Mrs. Beahan subsequently allowed the plaintiff to use the horses for a special purpose did not change the position of the parties, as the act of putting the landlord into possession fixed and established her rights. In regard to the crops and farm produce it is enough to say that they, as soon as they came into existence, vested in the landlord under the rule in *Grantham v. Hawley*, *supra*, even though it should appear that the plaintiff forbade the defendant from taking possession, a fact which does not clearly appear in the testimony, though it is plain that he prohibited the sale. The fact, however, that the plaintiff forbade the sale, was wholly immaterial, as the right of the landlord was then indefeasible by any act of the tenant.

Wholly independent of these considerations, the owner, Mrs. Beahan, became, according to the rule in *Taylor v. Marshall*, vested in equity with the title to all the subjects coming within the scope of the agreement as soon as they either came into existence or became the property of the plaintiff. As soon as the latter took title he was a trustee for Mrs. Beahan. The defendant, acting as her agent, can justify his acts under her title. The equitable rights of Mrs. Beahan may be set up as a defense to the plaintiff's action of trover. Code, § 150.

Some point was made on the argument as to the language of the lease being inapplicable to the hay and crops. The lien is created on all "goods, implements, stock, fixtures, tools and other personal property which may be put on said premises." These words are broad enough to include the farm produce. This is sufficiently described by the word "goods." The corresponding Norman French term "biens" is said to include property of every description, except estates of freehold. Bouvier's Dict., title "Biens." Lord COKE says: "Goods, *biens*, *bona*, includes all chattels as well as real and personal." Coke Litt. 118, *b*; Williams on Personal Property, 2. The farm produce may also be properly said to be "put" upon the premises. The word "put," in a general sense, means simply to "lay or place." When the crops were planted they were "put" upon the premises. This is also true of the hay, although while in the form of growing grass it was part of the

McCaffrey v. Woodin.

realty. There is no reason for giving a narrow and technical interpretation to the words used, but the intent of the plaintiff to make his landlord secure for the rent should be carried out by making the words include all personal property of every kind placed by the tenant upon the premises.

If these views are correct, the judge at the Circuit erred in refusing to submit any question to the jury except that of damages.

The judgment of the General Term should be reversed and a new trial ordered.

GRAY, C., also delivered a short opinion.

All concur.

Judgment reversed.

NOTE.—See *Apperson v. Moore*, 21 Am. Rep. 170 ; 30 Ark. 56 ; *Argues v. Wasson*, 21 Am. Rep. 718 ; 51 Cal. 620 ; *Low v. Pew*, 11 Am. Rep. 357 ; 108 Mass. 347 ; *Hutchinson v. Ford*, 15 Am. Rep. 711 ; 9 Bush, 318. In the first case it was held that a mortgagee of unplanted crops created an equitable lien, which attached as soon as the crops came into existence, and could be then enforced, and this was the gist of the decision in *Argues v. Wasson*. But in *Hutchinson v. Ford*, a mortgage of crops not sown was held to pass no title and that the mortgagee could not recover them, or their value, of one to whom the mortgagor had conveyed them, after they had been grown and harvested. In *Low v. Pew*, a sale of fish yet to be caught, was held to convey no title to the fish when caught, as the vendor had only an expectancy or possibility of acquiring the property, which was not sufficient — a potential existence being necessary. In a late case in Tennessee (*Wyatt v. Watkins*, 16 Alb. L. Jour. 205) the Supreme Court held that a mortgage by the owner of land, of a crop yet to be planted, is valid as against an execution creditor. While in a recent decision of the Supreme Court of Rhode Island (*Williams v. Briggs*, 16 Alb. L. Jour. 387) decided in March, 1877 — it was held that a mortgage of personal property, to be subsequently acquired, conveys no title to such property when acquired, which is valid against the mortgagor or his voluntary assignee, unless after the acquisition possession of such property is given to the mortgagee or taken by him under the mortgage.

The case presents such an elaborate review of the authorities, that we give it in full in advance of its report in the regular series.

DURFEE, C. J. This is an action of trover for the conversion of certain articles of personal property, which the plaintiff claims to own, as administrator on the estate of the late William B. Lawton. The title of William B. Lawton accrued to him under two mortgages, executed to him by the defendant, Nicholas C. Briggs, and dated respectively January 1, 1867, and July 2, 1870. The second mortgage purports to convey to Lawton "all and singular the tools, fixtures, stock in trade for the manufacture of carriages, and also all carriages made or in process of manufacture, now in my carriage factory, No. 234 High street, in said city (Providence), together with all my right, title and interest in and to the land and building used for and in connection with said factory. And also all and every article and thing that may be hereafter purchased by me to replace or renew the articles and things herein-before conveyed, and also

McCaffrey v. Woodin.

all stock, tools, fixtures and carriages, whether manufactured or in process of manufacture, that may be hereafter purchased by me to be used in or about my business of buying and selling, making and repairing carriages." On the 14th of August, 1875, the defendant, Nicholas C. Briggs, made to the defendant, Edwin Winsor, a general assignment of all the property of which he was the lawful owner, excepting only what and so much as was exempt from attachment by law, in trust for the equal benefit of all his creditors. Under this assignment the said Edwin Winsor took possession of the assigned property, among which was the property for the conversion of which this action is brought. It appeared at the trial, which was had before the court, jury trial being waived, that only a small part of the property which is in controversy was in the possession or ownership of the said Nicholas C. Briggs at the time the second mortgage was made, the larger part of it having been subsequently acquired for the purpose, however, of renewing or replacing the stock and property which the said Nicholas C. Briggs then had. The case, therefore raises the question whether a mortgage of property to be subsequently acquired conveys to the mortgagee a title to such property when acquired, which is valid at law as against the mortgagor or his voluntary assignee. The question is one which, so far as we know, has never been decided in this State by the Supreme Court sitting in Banco.

We think such a mortgage is ineffectual to transfer the legal title of the property subsequently acquired, unless, when acquired, possession thereof is given to the mortgagee or taken by him under the mortgage. This view is supported by numerous cases in Massachusetts: *Jones v. Richardson*, 10 Metc. 481; *Moody v. Wright*, 13 id. 17; *Barnard v. Eaton*, 2 Cush. 294; *Codman v. Freeman*, 3 id. 306; *Chesley v. Josselyn*, 7 Gray, 489; *Henshaw v. Bank of Bel-lows Falls*, 10 id. 568; by cases in other States: *Otis v. Sill*, 8 Barb. S. C. 102; *Milliman v. Neher*, 20 id. 37; *Hunt v. Bullock*, 23 Ill. 320; *Hamilton v. Rogers*, 8 Md. 801; *Chynoweth v. Tenney*, 10 Wis. 397; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 id. 207; *Single v. Phelps*, 20 id. 398; *Gale v. Burnell*, 7 Q. B. 850; *Lunn v. Thornton*, 1 C. B. 379; *Robinson v. McDonnell*, 5 M. & S. 228; *Congreve v. Evetts*, 10 Exch. 298; also in 26 Eng. Law & Eq. 493. The reason on which the cases rest is expressed in the maxim, *Nemo dat quod non habet*. No person can grant or charge what he has not. The maxim, in its strict sense, is confined to cases at law. There are cases in equity which hold that such a mortgage is effectual to charge the property, when acquired, with an equitable lien, or to create an equitable title in it in favor of the mortgagee against the mortgagor, and even, as some of the cases maintain, against attaching creditors, especially where they have actual notice of the mortgage. *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, 630; *Pennock et al. v. Coe*, 23 How. (U. S.) 117; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; *United States v. New Orleans R. R. Co.*, 12 id. 862; *Butt v. Ellett*, 19 id. 544; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Tedford v. Wilson*, 3 Head, 311; *Sillers et ux. v. Lester*, 48 Miss. 513; *Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. S. C. 284. The ground of these decisions is that the mortgage, though inoperative as a conveyance, is operative as an executory contract which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done. But in the case at bar the plaintiff is not suing in equity, but at law in an action of trover for the tortious conversion of the property, and is suing not a mere wrong-doer, but the persons having the legal ownership of the

McCaffrey v. Woodin.

property, and certainly, therefore, cannot prevail without proof of something more than a merely equitable title or interest. He ought to prove that he has the legal title or ownership, either general or special, and the right of present possession. *Fulton, Adm'r, v. Fulton*, 48 Barb. S. C. 581; *Herring v. Tilghman et al.*, 13 Ired. 392; *Killian, Adm'r, v. Carrol*, id. 431; *Lonsdale v. Fairbrother*, 10 R. I. 327.

It is true, language was used in some of the cases above cited, decided in the Supreme Court of the United States, which seems to go beyond what we have stated to be the effect of the cases; but the cases referred to were cases in equity, and we presume, therefore, the language was designed to express the rule in equity, and not at law, except in so far as the rule at law had been modified by statute, or, the cases being railway cases, in so far as the rule may be regarded as modified by considering the rolling stock and equipment of a railroad as fixtures. And see *The Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. S. C. 484; *Pierce v. Emery*, 32 N. H. 484.

The plaintiff's counsel claims that there are cases at law upon the authority of which he is entitled to recover. He cites *Chapman v. Wetmer et al.*, 4 Ohio St. 481; *Carr v. Allatt*, 3 H. & N. 934; *Chidell v. Galsworthy*, 6 C. B. (N. S.) 470. In these cases possession of the after-acquired property had been given to the mortgagee, or lawfully taken by him under the mortgage, and it was for this reason that the mortgagee was held to have acquired the legal title, and not because it was supposed the mortgage itself was effectual to transfer it. There are numerous cases which hold that, though the mortgage *per se* is inoperative to transfer the legal title, possession so given or taken under it transfers the legal title to the mortgagee, being the *Novus actus interveniens* required by Lord BACON's maxim to give effect to the mortgage as a *declaratio procedens*. The maxim is "*Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio procedens quæ sortiat effectum, interveniente novo actu.*" Broom's Legal Maxims, 498; *Hope v. Hayley*, 5 El. & B. 830; also in 34 Eng. Law & Eq. 189; *Langton v. Horton*, 1 Hare, 549; *Congreve v. Evetts*, 10 Exch. 290; also in 28 Eng. Law & Eq. 493; *Baker et al. v. Gray et al.*, 17 C. B. 462; *Carrington v. Smith*, 8 Pick. 419; *Rowley v. Rice*, 11 Metc. 333; *Rowan v. Sharp's Rifle Manuf. Co.*, 29 Conn. 282; *Titus et al. v. Mabee et al.*, 25 Ill. 257; *Chapin v. Cram*, 40 Me. 561; *Bryan v. Smith*, 22 Ala. 534; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207. In the case at bar the plaintiff has never acquired the legal title in this way, for he has never been in possession of the property.

The plaintiff also claims to be entitled to recover upon the authority of *Abbott v. Goodwin*, 20 Me. 409. The mortgage in that case was not a mortgage, of property to be subsequently acquired. It was a mortgage given to secure the payment of certain notes upon a stock of goods then in the possession of the mortgagor, and contained a stipulation that the mortgagor should retain possession of the goods, "and pay over and account for the proceeds of all sales of said goods to them (the mortgagees), to be applied in payment of said notes, or directly to apply said proceeds to the payment of said notes, at the discretion" of the mortgagees. The action was trespass for taking four hundred casks of lime, obtained by the mortgagor in exchange for goods or the proceeds of goods mortgaged to the plaintiffs. The court sustained the action, holding that the lime must be considered as substituted for and representing the goods which were mortgaged, having been exchanged for them or their proceeds, by the mortgagor acting as the agent of the mortgagees.

In the case at bar there was no stipulation reserving to the mortgagee control of the proceeds of the property sold by the mortgagor, and, moreover, there

is no evidence that the new property was paid for out of the proceeds of the old, or, in fact, that it was paid for at all, though there is evidence that it was acquired to renew or replace the old. We think, therefore, the case of *Abbott v. Goodwin*, 20 Me. 408, is not an authority which can control the case at bar. And see *Rhines v. Phelps*, 8 Ill. 455; *Holly v. Brown*, 14 Conn. 255, 265; *Levy v. Welsh*, 2 Edw. Ch. 438; *Chapin v. Cram*, 40 Me. 561.

In *Hamilton v. Rogers*, 8 Md. 301, it was held that a mortgage of goods in a store, "together with all renewals and substitutions for the same or any part or parts thereof," did not convey subsequently-acquired goods so as to give the mortgagee an action at law against a party seizing them. And *Rose et al. v. Bevan*, 10 Md. 466, maintains that the rule is the same even though the new goods are paid for out of the proceeds of the old. And in Massachusetts, such mortgages have been repeatedly condemned as ineffectual to confer any title to the goods subsequently acquired, though acquired in the usual course of business, and by way of substitution for goods which were mortgaged. *Jones v. Richardson*, 10 Metc. 481; *Moody v. Wright*, 13 id. 17; *Barnard v. Eaton et al.*, 2 Cush. 294. And see *Codman v. Freeman*, 3 id. 306. In the case at bar the only fact proved is that the new goods were acquired in the usual course of business to replace the old. We do not think this is enough to give the mortgagee the same title in the new goods which he had in the old, or, in fact, to give him any legal title in them. The plaintiff contends that the defendants are estopped from denying his title. The facts set up by the defendants are not in contradiction of, but in conformity with the mortgages. The mortgages contain no express covenants of title. The case, therefore, discloses no ground for the application of the doctrine of estoppel. *Chynoweth v. Tenney et al.*, 10 Wis. 397.

We decide that the plaintiff cannot recover in this action for goods acquired after the mortgage was given.

SHATTUCK, appellant, v. LAMB.

(65 N. Y. 499.)

Covenant for quiet enjoyment—extends to title—inability of covenantee to obtain possession.

Where land conveyed with covenant of quiet enjoyment is in the possession of a stranger under paramount title who keeps out the grantee, the covenant is broken. Overruling *Korts v. Carpenter*, 5 Johns. 120.

ACTION to recover damages for breach of a covenant for quiet enjoyment. The opinion states the case. At the trial of the action the court directed a verdict for the plaintiff, subject to the opinion of the Supreme Court at General Term, but the General Term denied the motion for judgment on the verdict upon the ground that the plaintiff never having had possession, there was no breach of the covenant.

Shattuck v. Lamb.

David B. Prosser, for appellant. The covenants in the deed from Lamb to plaintiff were general, and extended to any and every lawful disturbance of plaintiff in the possession of said premises or any part thereof. *Rickert v. Snyder*, 9 Wend. 416; *Fowler v. Poling*, 6 Barb. 165; *Webb v. Alexander*, 7 Wend. 281. Possession by Campbell at the time of the conveyance by Lamb to Shattuck under a paramount title was of itself an eviction by paramount title, and constituted a breach of the covenant for quiet enjoyment and warranty in the deed from Lamb to plaintiff. *Grist v. Hodges*, 3 Dev. (N. C.) 200; Rawle on Cov. for Title, 152-172, and notes (4th ed.); *Duval v. Craig*, 2 Wheat. 62; *Noonan v. Lee*, 2 Black (U. S.), 507; *Curtis v. Deering*, 12 Me. 501; *Blanchard v. Blanchard*, 48 id. 174; *Phelps v. Sawyer*, 1 Aik. (Vt.) 158; *Park v. Bates*, 12 Vt. 381; *University of Vt. v. Joslyn*, 21 id. 52; *Clark v. Conroe*, 38 id. 475; *Russ v. Steele*, 40 id. 315; *Loomis v. Bedell*, 11 N. H. 74; *Miller v. Halsey*, 2 Green (N. J.), 59; *Gardner v. Keteltas*, 3 Hill, 330; *Small v. Reeves*, 14 Ind. 164; *Wilder v. Ireland*, 8 Jones' L. R. (N. C.) 87; *Randolph v. Meeks*, Mart. & Y. 58; *Cadwell v. Kirkpatrick*, 6 Ala. 60; *Banks v. Whitehead*, 7 id. 83; *Dennis v. Heath*, 11 Smed. & M. (Miss.) 206; *Witty v. Hightower*, 12 id. 478; *Cummins v. Kennedy*, 3 Littell (Ky.), 123; *Barnett v. Montgomery*, 6 Monr. (Ky.) 328; *Playter v. Cunningham*, 31 Cal. 229; *Moore v. Vail*, 17 Ill. 185; *Murphy v. Price*, 48 Mo. 250; *Rea v. Minkler*, 5 Lans. 196; Platt on Cov. 327; *Ludwell v. Newman*, 6 T. R. 458; *Waldron v. McCarty*, 3 Johns. 471; *Kortz v. Carpenter*, 5 id. 120; *Kerr v. Shaw*, 13 id. 236; *St. John v. Palmer*, 5 Hill, 599; *Winslow v. McCall*, 32 Barb. 241; *Hunt v. Amidon*, 4 Hill, 345; *Cowdrey v. Coit*, 44 N. Y. 382; *Duval v. Craig*, 2 Wheat. 45.

Charles G. Judd, for respondent. The covenant for quiet enjoyment could only be broken by an actual eviction or actual ouster after possession had been taken by the covenantee. *Rindskopf v. F. L. and T. Co.*, 58 Barb. 36, 49; *Kerr v. Shaw*, 13 Johns. 236; *Waldron v. McCarty*, 3 id. 471; *Kortz v. Carpenter*, 5 id. 120; *Webb v. Alexander*, 7 Wend. 281, 284; *St. John v. Palmer*, 5 Hill, 599; *Beddoe v. Wadsworth*, 21 Wend. 125; *Kelly v. D. Ch. Schoenectady*, 2 Hill, 111; *Fowler v. Poling*, 6 Barb. 165, 170, 172; *Blydenburgh v. Cotheal*, 1 Duer, 176, 195; *Winslow v. McCall*, 32 Barb. 241; *Frisbee v. Hoffnagle*, 11 Johns. 50; *Vandekarr v. Van-*

dekarr, id. 122; *Jackson v. Rice*, 3 Wend. 182; *Rickert v. Snyder*, 9 id. 422.

EARL, C. The action was to recover damages for an alleged breach of the usual covenant of warranty for quiet enjoyment contained in a deed, made by defendant to plaintiff, of land situate in Yates county. At the time of the execution of the deed, a portion of the land was in the actual possession of one Campbell, under paramount title, and the plaintiff was not able to obtain possession of such part. He once entered upon the land and Campbell sued him for trespass and recovered on the strength of his title. During the pendency of that suit, plaintiff sued Campbell in ejectment and was defeated by his superior title. Plaintiff gave defendant notice of both actions, and requested his assistance in prosecuting the one and defending the other. A verdict having been taken for plaintiff at the Circuit, he was defeated and judgment given to the defendant at the General Term, upon the sole ground that plaintiff, never having been in possession of the land, had not been evicted therefrom, and hence that there was no breach of the covenant.

The sole question, therefore, for our consideration is, whether the covenant for quiet enjoyment in a deed of land is broken, so as to enable the covenantee to maintain an action thereon, where the land at the time of the execution of the deed was in the possession of a third person under paramount title, and thus the covenantee was unable to obtain possession. This question is not free from doubt under the decisions of the courts of this State. The language of the covenant is broad enough to cover a case like this, as well as one where the covenantee has obtained possession and has then been evicted by one having a superior title. There is just as much reason for applying it to one case as the other, and both cases seem to be equally within the presumed intention of the parties. The rule that there must be an eviction before there can be a recovery upon such a covenant has its foundation in the reason that the covenantee who has obtained possession should not be permitted to recover for breach of covenant for a mere failure or defect of title, so long as he is left in possession, as he may never be disturbed, and thus may never suffer damage; and the rule had its origin and was first announced at a time when conveyances of land were made by livery of seizin, and possession always accompanied the transfer of title. It is not applicable to a case where

the covenantee has not been able to obtain possession for the reason that another was in possession under paramount title. There must doubtless be in every case, what is equivalent to an eviction. The covenantee must be either kept out or put out of possession. In the former case there is a *quasi* or constructive eviction sufficient to give effect to the covenant.

The only case which I have been able to find decided, either in England or this country, which is nearly, if not quite in point for the defendant, is that of *Kortz v. Carpenter*, 5 Johns. 120. That was an action for breach of a covenant for quiet enjoyment, and the declaration alleged a breach of this covenant, "and that the premises described, etc., at the time of executing the deed, and a long time before, etc., to wit, time out of mind, were adversely, by lawful title and right, held, possessed and enjoyed by the proprietors and claimants of the great or Hardenbergh patent, etc., and so the plaintiff says," etc. The defendant demurred to the declaration, because the plaintiff alleged "no eviction, nor any disturbance to or interruption of the plaintiff in the enjoyment of the premises, nor any act alleged to have been done in relation to the premises since the deed was executed." There was joinder in the demurrer, and the case was disposed of by a *per curiam* opinion, as follows: "This case cannot be distinguished from that of *Waldron v. McCarty*, 3 Johns. 471. The covenant for quiet enjoyment goes to the possession and not to the title. It appears to be a technical rule that nothing amounts to a breach of this covenant but an actual eviction or disturbance of the possession of the covenantees. 8 Co. 89 *b*; Comyn's Rep., *Anon*, 228. The defendant is, therefore, entitled to judgment." That case seems to have been summarily disposed of, and for the broad doctrine laid down there was little or no authority. In the case of *Waldron v. McCarty*, the covenantee obtained possession of the premises, and was in the possession, when he sued for breach of the covenant, never having been evicted, and hence that case was entirely unlike the latter one for which it was cited as authority. The case of *Kortz v. Carpenter* was unlike the one now under consideration in this, that in that case there was no allegation that the covenantee had made any efforts or taken any legal proceedings to obtain possession; and that consideration may have influenced the decision, for at that time it was supposed that there must have been an eviction by process of law before suit could be maintained upon such a

covenant. *Greenby v. Wilcocks*, 2 Johns. 1; *Lansing v. Van Alstyne*, 2 Wend. 564. It has, however, since been settled in this State that there need be no eviction by process of law, but that a covenantee may voluntarily surrender possession to one having paramount title, and then maintain his action for breach of covenant. *Greenvault v. Davis*, 4 Hill, 643; *St. John v. Palmer*, 5 id. 600; *Fowler v. Poling*, 6 Barb. 165. That case has never been followed in this State in any reported cases where the precise question was involved, but it has received some countenance in the *dicta* of learned judges. In *Beddoe's Executor v. Wadsworth*, 21 Wend. 120, COWEN, J., says: "No possession ever having been taken under the deed, there could be no actual eviction, which is said to be essential to a recovery upon a covenant of warranty." In *St. John v. Palmer*, *supra*, BRONSON, J., says: "If the covenantee never had the possession, or if he had the possession and retains it still, it is impossible that there should have been an eviction, and no action will lie, however hard the case may seem to be." In the case of *Rindskopf v. Farmers' Loan and Trust Company*, 58 Barb. 36, there was a general covenant to warrant and defend the premises conveyed against all lawful claims, and it was held that this included the covenant for quiet enjoyment. In that case, the deed containing the covenant was executed in 1852, when third parties were in the adverse possession of the premises conveyed. No actions were commenced to recover the possession until 1867, when the parties in possession succeeded upon their adverse possession. JOHNSON, J., writing the opinion, after saying, that as there had been no possession under the conveyance, there could have been no eviction, says: "The plaintiff, and others claiming under or through Friselle (defendant's grantee), have not lost their land by a title paramount existing at the time the covenant in question was made by the defendant, but by their own laches in suffering an imperfect and inferior claim of title to become a legal title paramount to theirs."

On the contrary, in *Withers v. Powers*, 2 Sandf. Ch. 350, note, it was held, that "an eviction is established by proof, that at the time of the purchase the lands sold were actually occupied under a valid hostile title, so that the purchaser could not obtain possession of the same, and whereby he never did obtain actual possession." That was not an action upon any covenant, and is valuable only as some authority defining what may constitute a legal evic-

Shattuck v. Lamb.

tion. In *Gardner v. Keteltas*, 3 Hill, 330, NELSON, Ch. J., says : "The covenant of quiet enjoyment means to insure to the lessee a legal right to enter and enjoy the premises, and if he is prevented from entering into the possession by a person already in, under a paramount title, the action may be sustained. That was decided in *Ludwell v. Newman*, 6 T. R. 458. In such a case no ouster or expulsion is necessary on which to predicate a suit, as the lessee is not bound to enter and commit a trespass." In *Winslow v. McCall*, 32 Barb. 241, the action was for breach of covenant of warranty and quiet enjoyment, and the premises conveyed were, at the time of the conveyance, in the possession of a third person, and the covenantee was never actually in the possession, yet it was held that he could recover.

It will thus be seen that the rule to be applied to such a case as this is not thoroughly settled in this State ; at least not so thoroughly settled as to forbid further consideration. The claim that an action for breach of covenant for quiet enjoyment cannot be maintained when, at the time of the conveyance, the premises were actually in the possession of a third person under a paramount title, and the covenantee has not been able to obtain possession, has received but little countenance outside of this State. The rule is otherwise in England as was admitted by Judge COWEN, in *Beddoe's Executor v. Wadsworth*, 21 Wend. 126. In *Clarke v. Harper*, found in 6 Vin. 427, the action was upon an express covenant for quiet enjoyment. The plaintiff set forth in his declaration that the lands belonged to the king, who had conveyed them to J. S. The defendant demurred because the plaintiff did not allege an entry by himself, and so could not be disturbed. The court held the declaration good for having set forth a title in the patentee of the king, that the plaintiff should not be enforced to enter by a tortious act, and rendered judgment for plaintiff. This same principle was recognized in *Hacket v. Glover*, 10 Mod. 143 ; and in *Ludwell v. Newman*, 6 T. R. 458, it was decided that a covenant for quiet enjoyment in a lease meant a legal entry and enjoyment, and was broken by a prior lease to another who had taken possession. In 5 Wentworth's Pl. 53, a work published in the latter part of the last century, there is a form of declaration in an action of covenant where the breach assigned is that the plaintiff was hindered and prevented from entering and was kept out of possession. In Platt on Cov. 327, it is said that to qualify a party to support

an action on a covenant for quiet enjoyment some positive act of molestation or some deed amounting to a prohibition of enjoyment must be proven, but that "it is not to be understood that an ouster or expulsion must take place in order to found a suit; it is enough that the quiet enjoyment of the covenantee be invaded or prevented."

"The rule, as thus shown to exist in England, has been generally followed in this country. In *Caldwell v. Kirkpatrick*, 6 Ala. (N. S.) 60, the covenantee was never in possession, and it was held that to constitute a breach of the warranty for quiet enjoyment it is not necessary there should be an actual expulsion, and that the covenant secures a legal entry as well as the enjoyment. In *Banks v. Whitehead*, 7 Ala. (N. S.) 83, it was held that, in an action of covenant upon a general warranty, the averment that at the sealing and delivery of the deed one N. had the lawful title, freehold and possession of the land warranted, and still continues so to have by reason thereof, the grantee is, and always has been, unable to recover possession," shows a sufficient breach of the covenant and is equivalent to the assertion of a legal ouster. In *Murphy v. Price*, 48 Mo. 247, the same rule was laid down in a case where the covenantee could not obtain possession. In *Moose v. Vaile*, 17 Ill. 185, it was held that if, at the time a conveyance is made, the premises conveyed are actually in the possession of a third party claiming under a paramount title, it amounts to an eviction *eo instanti*. And there was the same holding in *Playter v. Cunningham*, 21 Cal. 229, in the case of a lease containing a covenant for quiet enjoyment. In *Cummings v. Kennedy*, 3 Littell (Ky.), 118, the learned judge writing the opinion forcibly says: "According to our rules, if the covenantee has possession and another brings his action and evicts him, he sues on his covenant, and on proving that he gave notice of the action of eviction against him to his warrantor so as to enable him to defend it, or that a recovery was had against him by title paramount, so that neither he nor his warrantor could have defended successfully, this, *prima facie*, sustains the breach of the covenant and entitles him to recover; and more has not been required when the warrantee has stood as a demandant in the action of eviction. It is difficult to assign any good reason why the same proof should not maintain the breach when he had the attitude of a plaintiff or demandant. In the first case he has entered and is ousted by title paramount;

Shattuck v. Lamb.

in the latter he is prevented from entering and enjoying by a title of the same character. In one case the title may drive him from the land as soon as he is on it; in the other he is precluded from the least enjoyment, or even entering thereon. The effect is the same, or worse, in the latter case, than the former, and is produced by the same cause." In *Witty v. Hightower*, 12 S. & M. (Miss.) 478, it was decided that if, at the time of the sale, there is a paramount title and an adverse possession under it, the holding out of the purchaser is equivalent to eviction. In *Small v. Reeves*, 14 Ind. 163, it is said that "any adverse possession under paramount title at the time of the conveyance, it seems, is an eviction, and renders the conveyance made utterly void." In *Park v. Bates*, 12 Vt. 381, the action was upon a covenant of warranty, and it appeared that the land was a wood lot, and that the plaintiff had never been in possession. It was claimed that there was no eviction, because the plaintiff had never taken possession. WHITNEY, Ch. J., said: "When the grantee goes into possession under his deed, he can maintain no action on his covenant, unless there is an eviction. Speaking technically, there has been no eviction here, because an eviction means an entry and expulsion. But there are many cases when an action may be maintained on this covenant without such an eviction when the grantee has been prevented from entering and enjoying the premises. * * * I apprehend that, in the covenant for quiet enjoyment, and *a fortiori* on this covenant of warranty, it is not necessary to state or prove a technical eviction, but the action may be maintained if the plaintiff is hindered and prevented, by any one having a better right, from entering and enjoying the premises granted." The same doctrine was affirmed in *Clark v. Estate of Conroe*, 38 Vt. 469, where it was held that when, at the time of the conveyance, the grantee finds the premises in possession of one claiming under paramount title, the covenant for quiet enjoyment or of warranty will be held to be broken without any other act on the part of either the grantee or the claimant. In *Duvall v. Craig*, 2 Wheat. 62, Judge STORY says: "Assuming that an averment of an entry and eviction under an elder title be, in general, necessary to sustain an action on a covenant against incumbrances, it is clear that it cannot be always necessary. If the grantee be unable to obtain possession in consequence of an existing possession or seizing by a person claiming and holding under an elder title, this would certainly be equiva-

lent to an eviction, and a breach of covenant." In *Noonan v. Lee*, 2 Black (U. S.), 507, Mr. Justice SWAYNE says, that, "in all cases where there is adverse possession by virtue of a paramount title, such possession is regarded as eviction, and involves a breach of the covenant of warranty." See, also, *Grist v. Hodges*, 3 Dev. (N. C.) 200.

In some of the cases cited, the covenant sued on was a covenant of warranty; but it has been held that, so far as concerns the question under consideration, there is no difference between a covenant of warranty and a covenant for quiet enjoyment. *Rea v. Minkler*, 5 Lans. 196, and cases cited.

In Rawle on Covenants, 4th ed., 154, after a criticism of many cases, the rule is laid down as follows: "The rule, as best supported by reason and authority, would seem to be this: When, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment or of warranty will be held to be broken without any other act on the part of either the grantee or claimant; for the latter can do no more toward the assertion of his title, and as to the former, the law will compel no one to commit a trespass in order to establish a lawful right in another action." In 2 Hill. on Real Property, 383, it is said that "actual entry of the plaintiff is not necessary to constitute eviction. His deed gives him constructive possession, which is equivalent to entry." In 3 Washburn on Real Property, 398, it is said: "If the covenantee find another in possession under a paramount right when he takes his deed he may have an action upon this covenant (for quiet enjoyment) without being obliged to subject himself to the hazard of an action of trespass by first entering upon the premises and being ousted."

No further citation of authorities is necessary or useful. The defendant, when he executed the conveyance to the plaintiff, had neither title nor possession to give. The plaintiff endeavored to obtain possession and was prevented by Campbell, who was in possession under paramount title. His case would have been no stronger if Campbell had let him into actual possession and then immediately ousted him by process of law or a voluntary submission to the superior title. The facts show a constructive eviction. The deed was inoperative as a conveyance, but the covenant must have effect. I can perceive nothing in the language, or in the nature of the covenant for quiet enjoyment, which requires first pos-

Shattuck v. Lamb.

session and then an eviction before a breach can be alleged. But, if such were the case, I would hold, for the purpose of giving effect to the covenant, that the grantor was estopped from denying that there was a possession for an instant and *eo instanti* an eviction by the paramount title.

It follows that the judgment of the General Term must be reversed and judgment ordered for the plaintiff on the verdict, with costs.

Judgment reversed.

DWIGHT, C., delivered a dissenting opinion.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

STATE V. JOHNSON.

(75 N. C. 122.)

Verdict upon an indictment charging different offenses.

A general verdict of "Guilty" upon an indictment containing two counts, one for stealing a horse, and the other for receiving a horse, knowing the same to have been stolen, is error, and entitles the prisoner to a *venire de novo*.

INDICTMENT for larceny and for receiving stolen goods. At the trial the jury rendered a verdict of "guilty," and thereupon the prisoner moved the court to arrest the judgment upon the ground that the bill of indictment contained two counts charging different offenses with different punishments, to-wit: the first count charging the larceny of a horse, and the second charging the prisoner with receiving a horse, knowing him to have been stolen, and that the jury had returned a verdict of guilty generally.

The motion was overruled by the court and judgment of imprisonment in the State penitentiary pronounced.

The prisoner appealed.

Attorney-General Hargrove and Bailey, for the State.

Starbuck and Tourgee, for the prisoner.

State v Johnson.

PEARSON, C. J. Since the establishment of the penitentiary offenses against the public are divided into three classes · 1. Offenses that are punished by hanging. 2. Offenses that are punished by confinement in the penitentiary. 3. Offenses that are punished by fine or imprisonment in the county jail, or both.

If on trial for an offense of the first class the judge directs a mistrial, he is required to find the facts, and his action is the subject of review in this court, a practice based on the sacred principle of the common law—no man shall be twice put in jeopardy of life or limb. The word “limb” having reference to the barbarous punishment, which has now become obsolete, of striking off the hand. Coke Litt. 227; 3 Inst. 110.

On a trial for an offense of the other two classes, the discretion of the presiding judge is not the subject of review, and, as in trials of civil actions, he assumes the responsibility of making a mistrial whenever he believes it proper to do so in furtherance of justice. *State v. Weaver*, 13 Ired. 203; *Brady v. Beason*, 6 id. 425.

In *State v. Williams*, 9 Ired. 140, it is said: “The jury should be satisfied that the prisoner was guilty in one of the modes well charged; and if so, it was manifestly of no consequence whether the conviction was on any one or all of these counts, since the offenses were of the *same grade and the punishment the same*. The instruction might relieve the jury of some trouble in their investigation, but could work no prejudice to the prisoner.”

It is clear our case does not come within that principle, for the offenses charged in the two counts are not of the same grade, and the punishment is not the same; so, upon a *general verdict*, “the record” does not enable the court to know upon which count, in other words, for which offense, the prisoner should be sentenced, and no judgment can be given without inconsistency and error apparent upon the face of the record.

By the act of 1868 “stealing a horse” is made both as to the principal and the accessor *before* the fact, subject to much severer punishment than ordinary larcenies (see Bat. Rev., chap. 32, § 17), while the offense of receiving a horse knowing it to have been stolen is left as before. The judge in passing sentence would feel it to be his duty, in order to observe the grade of punishment, to be more severe in punishing “horse stealing” than in receiving a stolen horse; but the record does not inform him of which one of these two distinct offenses the prisoner is convicted. During the

war *actual* horse stealing grew into alarming proportions. This crime was "a survival of the war," and the act of 1868 was passed to remedy the evil by increasing the punishment. The evil was so great in the western part of the State that a bill was offered in the General Assembly to make "horse stealing" a *capital* crime. It may admit of question whether, construing the act in reference to the evil intended to be remedied; it can be made to embrace *constructive* horse stealing, that is, obtaining a horse with the consent of the owner by means of a forged order, or other fraudulent contrivance, as distinguished from *actual* horse stealing, that is, taking and carrying away a horse without the consent of the owner. However this may be, the offense certainly comes within the words and the meaning of the act (Bat. Rev., chap. 32, § 66), making it a misdemeanor to obtain possession of property by means of any forged or counterfeit paper, etc, with intent to defraud the owner, etc. This embraces a horse as well as any other chattel. There is an apparent incongruity in making the same act amount to "horse stealing" under the highly penal act of 1868, or to a misdemeanor, at the discretion of the solicitor who draws the bill. This may account for the reluctance of two juries to convict for the crime of "horse stealing."

This suggestion is made for the consideration of the solicitor, in case he shall consider it to be his duty to prosecute the matter any further after the arrest of judgment.

In *State v. Bailey*, 73 N. C. 70, where there was a general verdict upon two counts, it is assumed in the opinion that one of the counts was bad, and the question is not discussed.

In *State v. Wise*, 66 N. C. 120, it did not appear by the record proper, to wit: the bill of indictment, plea, issue and verdict, whether the prisoner was convicted under the act of 1869, which punishes the crime of arson by imprisonment in the penitentiary, or under the act of 1871, which punishes the crime by hanging.

For this error the judgment is reversed, and the court takes no notice of the fact set out in "the statement of the case," that the crime was committed in *August*, 1871, after the act of 1871 had gone into effect, on the ground that "the court must be informed judicially, by the record, under which of these two statutes the prisoner is convicted, before it can proceed to judgment?" Error apparent on the face of the record cannot be cured by a statement

State v. Parker.

of the judge. So, in our case, the error apparent on the face of the record is not cured, because his honor sets out the fact that "on the trial no evidence was offered bearing upon the second count." Upon motion in arrest of judgment, as upon demurrers and writs of error, the court is confined to what is apparent on the face of the record. This is familiar learning, which applies both to the civil and criminal side of the docket. A statement of the case from the judge's note is only relevant to motions for a *venire de novo* and the like.

There is error. Judgment reversed. This opinion will be certified, to the end that proceedings may be had agreeable to law.

PER CURLAM.

Judgment reversed.

STATE V. PARKER.

(75 N. C. 249.)

Assault — arrest — unlawful detention.

A constable arrested, without warrant, a person who was intoxicated, and imprisoned him in the "lock-up" until he became sober, when he discharged him without taking him before a magistrate. *Held*, that the constable was guilty of a criminal assault and battery.*

INDICTMENT for an assault and battery.

On the trial below the jury returned the following special verdict, to wit :

(1) That the defendant did arrest the prosecutor, Robert Starkey, and against his consent put him in the "lock-up," at Marlboro', and released him as soon as he became sober.

(2) That the defendant was town constable for the village of Marlboro', and arrested and imprisoned Robert Starkey as he thought in discharge of his official duty, as he so declared at the time, though he had no kind of process upon which to make the arrest.

(3) That Starkey at the time when arrested and imprisoned was intoxicated on or near the public streets of Marlboro', in full view of the citizens thereof, though at the time he was saying nothing and using no profane or vulgar language.

* See, also, *Brock v. Stinson*, 11 Am. Rep. 390 ; 108 Mass. 530.

State v. Parker.

(4) That the town of Marlboro' was incorporated, and the commissioners had passed the following ordinance, which was in force at the time of the alleged assault :

" Any person found in a state of intoxication, or using vulgar or profane language, is declared a nuisance, and shall incur a penalty not to exceed ten dollars for each offense."

Upon this special verdict his honor adjudged the defendant not guilty, and discharged him.

From this judgment the solicitor for the State appealed.

Attorney-General Hargrove, for the State.

Defendant had no counsel in this court.

BYNUM, J. Admitting that the ordinance in question is a valid one, it nowhere confers, and it could not constitutionally confer upon a constable, a ministerial officer, the power to arrest and imprison for a penalty incurred or for any other violation of law, except it may be for safe custody. Men may not be arrested, imprisoned and released upon the judgment or at the discretion of a constable or any one else. If the alleged offense be criminal in its character and committed in the presence of the officer, he may arrest and take the offender before a magistrate for trial. If the offense is penal only, and not a misdemeanor, the penalty can be recovered by action only. *Commissioners of Washington v. Frank*, 1 Jones, 436 ; Bat. Rev., ch. 111, § 20.

If the offense be a misdemeanor, then it must be tried as other misdemeanors. Here the prosecutor was not sued for the penalty of ten dollars imposed by the ordinance, nor was he arrested and taken before a magistrate for trial for a criminal offense ; but the constable arrested and imprisoned him, not for safe-keeping until he could be tried before a competent tribunal, but he imprisoned him until he became sober, according to his judgment, and then released him. The constable thus constituted himself the judge, jury and executioner. This is the best description of despotism.

It is unnecessary to decide whether the ordinance, from its generality and vagueness, is not inoperative and void.

Upon the special verdict, the defendant is, in law, guilty.

There is error. This will be certified, to the end that the court below may proceed to judgment.

Judgment reversed.

University v. North Carolina Railroad Company.

UNIVERSITY V. NORTH CAROLINA RAILROAD COMPANY.

(76 N. C. 103.)

Constitutional law — statute appropriating unclaimed dividends to public uses.

A statute provided that all dividends declared by any corporation, which should not be claimed within five years, by persons entitled thereto, should be devoted to a public use. *Held* unconstitutional.

ACTION for money. The plaintiffs alleged that they were entitled to all the dividends declared by any corporation chartered under the laws of this State, which have not been recovered or claimed by the parties entitled thereto, for five years after said dividends were declared, by virtue of the provisions of chapter 236, Laws 1874-'5; that the defendant company had, at divers times, declared dividends to its stockholders, which dividends have remained unpaid for more than five years, for the reason that they have not been received or claimed by the parties entitled thereto; and demanded judgment for an account of the dividends declared and unclaimed as aforesaid, to the end that the amount ascertained might be paid to the plaintiffs.

The defendant demurred to the complaint and assigned as cause.

1. That according to the true intent and meaning of Art. IX, § 6, of the Constitution, a cause of action may be given for dividends or distributive shares of the estates of deceased persons, but not against the defendant.

2. That the act of assembly referred to in the complaint is unconstitutional and inoperative, so far as it purports to give to plaintiffs a right to claim dividends declared to stockholders.

3. That the defendant company has the right to declare dividends, and the stockholders to receive the same when they see fit, and it is beyond the power of the legislature to invade this private right by an enactment.

His honor sustained the demurrer and dismissed the action. Judgment in favor of defendant for costs. Appeal by plaintiffs.

Battle & Mordecai, for plaintiffs.

Dillard & Gilmer, for defendant.

University v. North Carolina Railroad Company.

BYNUM, J. The Constitution of the State, Art. IX, § 6, declares "that all the property which has heretofore accrued to the State, or shall hereafter accrue from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University."

Purporting to carry into effect this constitutional provision, the legislature, by an act ratified the 22d of March, 1875, enacted: "That all dividends heretofore declared, or which shall hereafter be declared by any corporation, company or association, whether chartered or not, which shall not be recovered or claimed by suit, by the parties entitled thereto, for five years after the same were or shall be declared," shall be paid by the corporation, etc., to the Trustees of the University of North Carolina, and they are authorized to sue for and collect the dividends and hold them without liability for profit or interest; and if no claim is preferred within ten years, then to hold the same absolutely.

The question presented is, whether the provisions of the act are warranted by article IX, section 6, of the Constitution, which we have cited. We do not think they are. "Dividends" is a word of very general and indefinite meaning. It has, in law, no particular and technical signification. As it is used in the Constitution we think it is synonymous with "distributive shares," and used as a convertible term, meaning the same thing, to wit, "dividends or distributive shares of the estates of deceased persons." It is true, the punctuation of a comma after the word "dividends," as the section is presented, would seem to favor the plaintiff's construction, but when, by disregarding this punctuation, a construction is given to the Constitution, which makes it consistent with its other parts, and those great rights it is intended to secure, the courts cannot hesitate to adopt that course. Cooley, 171. Unless the word "dividend" is restricted by its context to a particular subject, it will apply to and embrace many other estates and interests with as much propriety as those of corporations and companies, but which were certainly not supposed to fall within its scope and operation; as for example, the dividends of a bankrupt's estate, and dividends to be paid by the more to the less valuable shares in proceedings in partition. Bat. Rev., ch. 84, § 5. Such a general and questionable application of the term, we think, was not designed by the framers of the Constitution.

University v. North Carolina Railroad Company.

It has been heretofore decided that the university is a public institution and body politic, founded by the State on the public funds and for a general public charity ; and that an administrator is an officer appointed by the State, in the exercise of a political trust, to take charge of dead men's estates ; and that getting his office and the possession of the assets from public authority, he must execute the office and account for and deposit the property, under the direction of the law. It is, therefore, held to be competent for the legislature to enact, that an administrator should, after a reasonable time, pay an unclaimed surplus of the estate, either to the University or other person charged by law with the keeping of the same, for the benefit of creditors and next of kin. It is merely changing the fund from one agency of the State to another without changing the trust. *University v. Maulsby*, 8 Ired. Eq. 257.

But assuming that the State may, in analogy to the power it originally possessed in England, dispose of the surplus of a deceased person's estate, after the payment of his debts, by first transferring the custody and use of it to the University, and finally the absolute property, we know of no principle or authority which extends that doctrine to the estates of living persons or existing private corporations. A dividend declared by and due from a private corporation is a debt due to the shareholder and is recoverable as such. If A owes a debt to B, and the legislature should enact, that if B fails to recover or sue for it within five years, the debt shall be taken from B and given to C, it will scarcely be denied that this would be confiscation and prohibited by section 17, article 1, of the Constitution. The contention of the plaintiff is not against an administrator for a surplus of a dead man's estate unclaimed in his hands, but it is against a corporation, to recover a debt which that corporation owes to a living man, the owner of the dividend, who sees fit not to pursue his debtor for the present. But if the legislative act is based upon the presumption, that the owner of the dividend has died, leaving no claimant to his property, it does not help the plaintiff's case, for in that event, the debt or dividend must devolve upon a legal representative and be disposed of in due course of administration, first to creditors, and then to the next of kin. In *Williamson v. Leland*, 2 Pet. 657, the court said : " We know of no case in which a legislative act to transfer the property from A to B without his consent, has ever been held a

University v. North Carolina Railroad Company.

constitutional exercise of the legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced." *Terrett v. Taylor*, 9 Cranch. 43 ; *Cooley on Const. Lim.* 165-'6.

The counsel for the plaintiff endeavored to support their case by drawing an analogy between the operation of the statute of limitations and the act under which they claim. The analogy fails them. The statute of limitations bars the remedy only, and the debtor retains the possession of his property. But the act under review not only bars the creditor of his right of recovery, but takes from him his property, transfers it to another, and enables that other to recover and own it. The creditor not only loses his property, but by the magic of this act and without consideration received, it is vested absolutely in another — it matters not whether that other is the State or its appointee.

But again : the defendant is a chartered corporation, founded by individuals on their own funds and for their own emolument. The government of the corporation is fixed by the charter, and is unalterable except by its own consent. Its property, also, is as secure as that of the individual citizen. Whatever advantages it has obtained by the grant of the State, they are exclusive to the corporation. *University v. Maulsby*, 8 Ired. Eq. 257. All contracts between the corporation itself and the stockholders, which are made pursuant to the charter, are equally inviolable. So whether we consider the corporation as a trustee for the dividend holder, as was insisted by the plaintiff, or as a debtor to the shareholder for the dividend declared, both relations between the parties are the result of contract, and the State is inhibited from stepping between the corporation and its stockholders, and changing or modifying these contract relations between them, or between the State and the corporation, without their concurrence. 4 Wheat. 518 ; 6 How. 310 ; 3 id. 133 ; *Cooley on Const. Lim.* 126-'7.

What claims, if any, the defendant corporation may have upon the unclaimed dividends of its stockholders depends upon the provisions of its charter and its by-laws. However that may be, forfeitures of rights and property cannot be adjudged by legislative act ; and confiscations, without a judicial hearing, after due notice to the party to be affected, would be void, as not being by due process of law. In the case before us, the owners of the un-

State v. Alexander.

claimed dividends are not parties to the action, and parties cannot, even by their misconduct, so forfeit their rights, that they may be taken from them without judicial proceedings in which the forfeiture shall be declared in due form. Cooley on Const. Lim. 363. So, whether we view the act of the legislature in the light of the Constitution of the United States as impairing the obligation of a contract, or in the light of our State Constitution, as conflicting with the provision which declares that no person shall be disseized or deprived of his property but by the law of the land, or whether it be considered in the light of plain and obvious principles of common right and common reason, we cannot find sufficient support to authorize the court to declare it to be a valid and existing law. It was based upon a misapprehension of the proper construction of article 9, section 6, of the Constitution.

There is no error.

Judgment affirmed.

STATE V. ALEXANDER.

(76 N. C. 231.)

Pardon — after "conviction" — pending an appeal.

The governor was authorized to grant pardons "after conviction." *Held*, that a pardon after verdict and judgment but pending an appeal taken by the prisoner, was valid.

INDICTMENT for larceny. The defendant was tried and the jury rendered a verdict of "guilty," whereupon the court rendered judgment that the defendant be imprisoned in the penitentiary for a term of five years at hard labor. From this judgment the defendant appealed to this court. When the case was called, the defendant entered a plea of pardon, granted after the appeal was taken, by the governor of the State.

The Constitution of the State (art. III, § 6) provided: "The governor shall have power to grant reprieves, commutations and pardons after conviction for all offenses."

Thomas S. Kenan, attorney-general, for the State.

Shipp & Bailey, for defendant.

READE, J. The pardoning power is a useful one. It answers about the same purpose in the administration of criminal matters that equity does in the administration of civil matters. Equity supplies that wherein the law by reason of its universality is deficient; and pardons supply that wherein the criminal law by reason of its universality is deficient. It is, however, capable of abuse. And the provision in our Constitution which allows its exercise only after trial and conviction is intended to prevent its abuse.

At common law the crown exercised the power of pardon at any time. The consequence was that crimes were smothered. The facts were not brought to light. The person charged was not brought before the public and required to answer the charge, and of course, the public were dissatisfied. But under our Constitution and statute, the person charged must be brought before the public in a public trial and face his accusers, and all the facts must appear and the jury must find him guilty, and the court must sentence him. If then he will ask for pardon, he cannot deceive the pardoning power. The public are in possession of the facts and can resist his application. Nor is the pardoning power any longer irresponsible to the public, because he has to report the facts and his reasons for exercising the power.

It is not denied that a pardon granted under these circumstances is valid, but the objection made is that these prerequisites do not exist in this case, for although the defendant had been regularly charged, tried, found guilty by the jury and sentenced by the court, thereby bringing his case within the constitutional provision, yet he took it out of the provision by appealing to the Supreme Court, which appeal vacated the sentence or judgment; and so there was no "*conviction*" remaining, and, therefore, the pardon is invalid as wanting a "*conviction*" to support it. And this brings us to the construction of the Constitution as to what is meant by "*conviction*." Does it mean the verdict of the jury, or the sentence of the court, or the verdict and sentence both? The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or, they convicted him. What did the judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him nor that the judge convicted him.

State v. Alexander.

In *State v. McIntire*, 1 Jones, 1, Chief Justice PEARSON says : "The judgment is referred to in the pardon as subsisting, whereas in fact it was annulled by an appeal to the Supreme Court, and if that court should decide there was error and direct a *venire de novo*, the conviction also would be annulled and the defendant stand as if there had been no trial."

There, manifestly the *verdict* is considered to be the *conviction*. See, also, *Blair v. Commonwealth*, 25 Gratt. 850, and *Commonwealth v. Lockwood*, 109 Mass. 323; S. C., 12 Am. Rep. 699. But furthermore the Constitution itself unmistakably fixes what it means by conviction. "No person shall be convicted of any crime but by the unanimous verdict of a jury," etc. Art. I, § 13.

Nothing can be a conviction but the verdict of the jury. Take that to be so ; still inasmuch as the Constitution in the same section in which it authorizes the governor to pardon "after conviction," requires him to report to the general assembly not only the *conviction* but the *sentence*, is it not intended that there shall be a sentence to report ; else how can he report it ? And if the appeal vacates the sentence, then there is no sentence to report ; and so there is no sentence to support the pardon. Technically that would seem to be so, but it is a refinement merely. Suppose the defendant in his application for pardon should say : "I was convicted of murder and sentenced to be hanged ; I appealed to the Supreme Court, but I abandon the appeal and pray for a pardon," might not the governor pardon him and in his report say that the applicant had been convicted of murder and sentenced to be hanged and appealed to the Supreme Court, but abandoned his appeal and prayed for pardon ; and that he had pardoned him because he was satisfied that he was innocent ? Would not that substantially comply with the Constitution to say that he had been convicted and that he had been sentenced, etc. ?

It is insisted that the object is not to pardon him while he is making defense, nor until he surrenders and begs for mercy. If that were true, still does he not surrender and beg for mercy when he abandons his appeal and prays for pardon ? But it is not always true that the defendant ought to be expected to surrender and beg for *mercy*. There are cases where he has been improperly convicted and asks not for *mercy* but for *justice*.

The pardon has been shown us, and the attorney-general consents that the case may be considered as if the pardon were properly pleaded.

State v. Ross.

We, therefore, declare that the defendant is entitled to be discharged on payment of costs and upon the terms of the pardon.

Pardon allowed.

PEARSON, C. J., delivered a dissenting opinion.

STATE v. ROSS.

(76 N. C. 242.)

Marriage — effect of State statutes as to.

By the law of North Carolina, marriages between negroes and white persons were unlawful. A white woman left the State in order to be married in another State, to a negro resident thereof, and not intending to return. She was so married and afterward did return with her husband. *Held*, that the marriage was valid in North Carolina.*

INDICTMENT for fornication and adultery, tried at August Special Term, 1876, of Mecklenburg Superior Court, before SCHENCK, J.

The defendants are indicted for fornication and adultery in living and cohabiting together without being lawfully married. The cohabitation is admitted. Their defense is that they were lawfully married. The facts as found by the special verdict are these: The defendant, Pink Ross, is a negro man, and the defendant, Sarah, a white woman. Pink Ross is a native of South Carolina, and resided there until August, 1873. Sarah Ross was a resident and citizen of North Carolina up to the time of the marriage between herself and the other defendant. In May, 1873, the defendant, Sarah Ross (then Sarah Spake), went to Spartanburgh, South Carolina, for the purpose of marrying the other defendant, and with the intention of evading the laws of North Carolina prohibiting marriage between persons of color and white persons. The defendants were married in South Carolina according to the laws of that State, in May, 1873. They lived in that State until August, 1873, as man and wife, when they moved to Charlotte, North Carolina.

* See *Commonwealth v. Lane*, 18 Am. Rep. 509, and note; S. C., 112 Mass. 452.

State v. Ross.

The laws of South Carolina do not forbid marriage between white persons and persons of color. On this verdict the judge held that the defendants were not guilty, and the State appealed.

Attorney-General, for the State.

Shipp & Bailey, for defendants.

RODMAN, J. [After stating the facts as above.] It will be observed that the verdict states that Sarah went to South Carolina with the intent to evade the law of North Carolina prohibiting the marriage of a negro with a white person. It does not say that she had an intent to return with her husband and live in this State. It is difficult to see how, in going to South Carolina to marry a negro, without an intent to return with him to this State, she could evade or intend to evade the laws of this State. Our laws have no extra-territorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that State. Such a case differs essentially from one in which both persons, being domiciled in North Carolina, leave the State for the purpose of contracting a marriage forbidden by its law, and with an intent to return to and reside in North Carolina after such marriage; and also from one in which the man alone leaves this State for that purpose and with that intent.

By the marriage of Sarah, the domicile of her husband became hers. And we must suppose that his domicile was *bona fide* in South Carolina until they removed to this State in August, 1873.

It does not appear that any change of domicile was thought of before that time. We must put out of view, therefore, the supposed intent to evade the law of North Carolina, as a conclusion of law unsupported by or repugnant to the facts found in the verdict, and consider the case as if both parties had been domiciled in South Carolina at the time of the marriage. It is clear that upon the marriage the domicile of the husband became that of the wife, and for that purpose it would be immaterial whether the marriage took place in the State of the husband or in any other State. Story's Confl. of Laws, §§ 194, 199. It was so held by this court in *Hicks v. Skinner*, 71 N. C. 539; S. C., 17 Am. Rep. 16; *Ibid.*, 72 N. C. 1. In *Warrender v. Warrender*, 9 Bligh, 89; 2 Clark & Finnelly, 488. A man domiciled in Scotland married an English woman in England, and it was held that the matrimonial domicile

was Scotland. This view seems to have been overlooked, as it is not alluded to in *Williams v. Oates*, 5 Ired. 535, which is, therefore, apparently opposed to our opinion on this point. But the judgment of the court may be sustained on the ground that the marriage in question there was not shown to be valid in South Carolina.

The question thus presented is an important one. The State of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy as tending to degrade them both. It has, therefore, declared such marriages void. It is needless to say that the members of this court share that opinion. For that reason it becomes us to be careful not to be unduly influenced by it in ascertaining, not what the law of North Carolina is upon such marriages contracted within her limits—that is found in the act of assembly and is beyond doubt—but what the law of North Carolina is upon the question presented, and for that we must look beyond the statutes of the State.

If we are right in our conception of the question presented, to wit: whether a marriage in South Carolina between a black man and a white woman *bona fide* domiciled there and valid by the law of that State, must be regarded as valid in this State when the parties afterward migrate here? We think that the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here.

We know of but two cases which appear to be to the contrary, which will be found in 10 La. Ann. 411, and 15 id. 342. Mr. Bishop, in noticing the first of these cases, has thought it fit to speak of the people whose court decided them in a tone not to have been expected from a philosophic jurist. *Telum imbelle*.

The general rule is admitted that a marriage between citizens of a foreign State contracted in that State and valid by its laws is valid everywhere where the parties might migrate, although not contracted with the rites required by the law of the country into which they come and between persons disqualified by such law from intermarrying. *Williams v. Oates*, 5 Ired. 535; *Brook v. Brook*, 9 H. L. Cas. 193; Story's Conf. of Laws, §§ 81–113; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 54.

It is contended, however, by the attorney-general that there is an exception to this rule as well established as the rule itself, viz.:

that incestuous and polygamous marriages, although lawful in the country in which they are contracted, will not be recognized in other States in which such marriages are deemed immoral and are prohibited. And it is further argued that a marriage between persons of different races is as unnatural and as revolting as an incestuous one, and is declared void by the law of North Carolina.

The exception certainly exists notwithstanding a *dictum* of a very great judge to the contrary in *Williams v. Oates*, 5 Ired. 535.

Story (§ 113a) says: "The most prominent if not the only known exceptions to the rule are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitled themselves under special circumstances to the benefit of the laws of their own country."

On examining the illustrations of these exceptions given by the author, it will be seen that they are considerably limited. Thus all Christian countries agree that marriages in the direct line and between the nearest collaterals are incestuous, and that polygamy is unlawful, consequently such marriages will be held null everywhere, because they were null in the place of the contract. But beyond these few cases in which all States agree, there is a difference as to what marriages are incestuous, and in such cases the admitted international law leaves it to each State to say what is incestuous in respect to its own subjects. In England, a marriage with the sister of a deceased wife is held incestuous, and between persons domiciled in England it will be held void wherever contracted. *Brook v. Brook*, 9 H. L. Cas. 193. But it does not follow that such a marriage contracted in a State where it was lawful, between subjects of that State, would be held void in England if the parties afterward became domiciled there. There is no reason to think it would be. Story, §§ 116, 116 a. Still stronger are the illustrations given in §§ 95, 96.

However revolting to us and to all persons who, by reason of living in States where the two races are nearly equal in numbers, have an experience of the consequences of matrimonial connections between them, such a marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world. When Massachusetts held such a number of negroes as to make the validity of such marriages a question of practical importance, her

sentiment and her legislation were such as ours are to-day. *Medway v. Needham*, 16 Mass. 157. Now since she has got rid of her negroes the question is of no practical importance to her. And as far as may be gathered from her statute book she considers such marriages unobjectionable. Most of the States of the Union and of the nations of Europe with whom the question is merely speculative take a similar view of it.

It is impossible to identify this case with that of an incestuous or polygamous marriage admitted to be such *jure gentium*. The law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister States. We are compelled to say that this marriage being valid in the State where the parties were *bona fide* domiciled at the time of the contract must be regarded as subsisting after their immigration here.

The inconveniences which may arise from this view of the law are less than those which result from a different one. The children of such a marriage, if born in South Carolina, could migrate here and would be considered legitimate. The only evil which could be avoided by a contrary conclusion is that the people of this State might be spared the bad example of an unnatural and immoral but lawful cohabitation. The inconveniences on the other side are numerous, and are forcibly stated in *Scrimshire v. Scrimshire*, 2 Hagg. Consist. Rep. 417, and in Story, § 121. "And, therefore, all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the law of the country where they are celebrated."

Upon this question above all others it is desirable (altering somewhat the language of Cicero with which Story concludes his great work) that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States.

There is no error in the judgment below. Let this opinion be certified.

Judgment affirmed.

READ, J., delivered a dissenting opinion.

State v. Kennedy.

STATE V. KENNEDY.

(76 N. C. 281.)

Marriage — State statutes as to — leaving State to avoid — lex loci contractus.

A negro and a white person, between whom marriage was prohibited in North Carolina, left the State for the purpose of avoiding the law, and with intent to return, and were married in another State where such marriages were lawful. *Held*, that the marriage was not valid in North Carolina.

INDICTMENT for fornication and adultery, tried at August Special Term, 1876, of Mecklenburg Superior Court, before SCHENCK, J.

By consent the following special verdict was rendered: Isaac Kennedy is a negro man and Mag Kennedy a white woman. In 1868 they were citizens of this State. Subsequently they went to South Carolina to avoid the law of this State prohibiting intermarriage of negroes and white persons, and were married according to the law of that State and immediately returned to this State. They did not intend to change their domicile from North Carolina, and have lived together as man and wife. The laws of South Carolina do not prohibit marriages between such persons.

Upon this state of facts his honor held that the defendants were guilty as charged in the bill of indictment, and the verdict was so entered. Judgment. Appeal by defendants.

Attorney-General, for the State.

Ship & Bailey, for defendants.

RODMAN, J. The defendants in this case were domiciled in North Carolina before and at the time of their marriage in South Carolina, to which State they went for the purpose of evading the law of North Carolina, which prohibited their marriage, and they, immediately after the marriage, returned to North Carolina, where they have since continued to reside.

To quote from the opinion of Lord CRANWORTH in *Brook v. Brook*, 9 H. L. 193: "There can be no doubt of the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry; how they shall marry; and the consequences of their marrying."

State v. Kennedy.

It is not necessary to say that a marriage contracted in another State between residents of this State, without the rites and ceremonies required in this State, will be void, even though the parties left this State for the purpose of evading those rights. *Dalrymple v. Dalrymple*, 2 Hagg. Consist. R. 54.

As to the formalities of the marriage the *lex loci* will govern. But when the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the State with the intent to evade its law or not, if they had not *bona fide* acquired a domicile elsewhere at the time of the marriage. Story's Conf. of Laws, § 65; *Williams v. Oates*, 3 Ired. 535. In *Brook v. Brook*, above cited, Lord CAMPBELL says: "It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile, as contrary to religion, or to morality, or to any of its fundamental institutions." In that case an Englishman casually met in Denmark the sister of his deceased wife and married her there. As such marriages were prohibited between English subjects, it was held void.

A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line.

There are cases to the contrary of this conclusion decided by courts for which we have great respect. They are cited and the whole question is learnedly and earnestly discussed by 1 Bishop on Marr. and Div., §§ 371, 389; *Medway v. Needham*, 16 Mass. 157; *Stevenson v. Gray*, 17 B. Monr. (Ky.) 193.

It seems to us, however, that when it is conceded as it is, that a State may, by legislation, extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries, by whose law no such incapacities exist, as Massachusetts did after the decision in *Medway v. Needham*, the main question is conceded, and what remains is of little importance. Nothing remains but the question of legislative intent to be collected from the statute. About the intent in this case we have no doubt.

There is no error. Let this opinion be certified.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

BROMLEY V. GOODRICH.

(40 Wis. 181.)

Bankrupt law — will not be enforced in State court — sale valid under State law but void in bankruptcy. Damages.

A State court will not annul a sale valid under the State law because it was designed to give a preference to a creditor, prohibited by the bankrupt act. A, being indebted to plaintiff, conveyed to him property by a sale valid under the State law. The property was afterward seized by the sheriff under an attachment as the property of A in a suit by other creditors. A was declared a bankrupt and the property was taken from the sheriff's possession under a warrant from the bankrupt court and sold by the assignee in bankruptcy without any adjudication that the sale to B was void. *Held*, that the plaintiff was entitled to recover the full value of the property from the sheriff and attaching creditors.

ACTION for conversion of plaintiff's goods.
The following were the essential facts : On the 17th of April, 1875, one Giles, a merchant, being indebted to plaintiff, conveyed to him, by a bill of sale valid under the State law, his entire stock of goods, being in value less than the indebtedness. On the 28th of the same month, these goods were seized by the sheriff (one of the defendants) under an attachment against the goods of said

Bromley v Goodrich.

Giles at the suit of the other defendants — creditors of said Giles. The May following, Giles was, on his own petition, adjudged a bankrupt, and the marshal was, by warrant of the United States District Court, ordered to take possession of the goods and property of said bankrupt, and thereupon took the goods from the possession of the sheriff and delivered them to the assignee of the said bankrupt, who sold them and claimed to hold them or their proceeds for the benefit of the creditors of said Giles.

The court instructed the jury that the taking of the goods by the defendants was unlawful, and plaintiff was entitled to recover at least nominal damages ; that if he obtained a good title to the goods by the bill of sale from Giles, then he was entitled to recover herein the value thereof, with interest from the taking ; and that his title would be indisputable but for the bankrupt law. As to the bankrupt law, the court charged that it was “ to be upheld and executed and carried out in all its vigor, in all its import, just as fairly and fully as any law that stands upon the statute book of the State of Wisconsin. It is the law of the land, and entitled to be respected accordingly.” The court then read to the jury the provisions of section 35 of the bankrupt law, and instructed them that if Giles was a merchant and trader, and as such was owing the plaintiff, and was insolvent, and if plaintiff, knowing or having reasonable cause to believe the fact of his insolvency, with a view to obtain a preference over the other creditors, received from Giles the bill of sale above mentioned, and that such bill of sale covered Giles’ entire stock of goods, then the sale was fraudulent and void under the bankrupt law.

Plaintiff had a verdict for nominal damages only ; a new trial was denied ; and from a judgment in accordance with the verdict, plaintiff appealed.

Hall & Skinner, for appellant.

Finches, Lynde & Miller, for respondent.

COLE, J. The Circuit Court clearly ruled that taking the property in controversy from the possession of the plaintiff was not justified by the attachment ; “ that that was an unlawful act.” The principle was recognized that under the State law a debtor had the right to prefer one creditor to another, and that the plaintiff acquired, by virtue of the bill of sale executed by Giles, a good

Bromley v Goodrich

title to the property, the bankrupt law being out of the question. But the court held, if the sale from Giles to the plaintiff was fraudulent and void under the provisions of the bankrupt law, that then only nominal damages could be recovered in the action. Indeed, the cause seems to have been tried wholly with reference to the bankrupt law, and upon the theory that the Circuit Court should exert its jurisdiction to enforce the penal provisions of that act. It is obvious that this was directly in the teeth of *Brigham, Assignee, v. Claflin*, 31 Wis. 607; S.C., 11 Am. Rep. 623. In that case it was held that the courts of this State would not take jurisdiction of an action brought by the assignee in bankruptcy to recover the value of goods transferred in fraud of the bankrupt law, but that the proper tribunal for avoiding the sale was the bankrupt court. That decision certainly rules this case, and shows that the court below erred in submitting to the jury the question whether or not the sale from Giles to the plaintiff was fraudulent under the bankrupt law. The proper forum for litigating that question was the bankrupt court. The learned circuit judge remarked in his charge, that the bankrupt act was a law of the land, entitled to be respected as such, and to be carried out and enforced in all its import and vigor, just as any law which stands upon the statute book of the State. This is true in a certain sense, but plainly is not true in the sense in which the case was put to the jury, as the observations already made show. It has been decided that the State courts should not enforce the penal provisions of that law, although they are doubtless bound to respect and sustain titles derived through bankrupt proceedings, and will give full effect to the adjudications of the bankrupt court. And had the sale from Giles to the plaintiff been avoided by any proper proceeding in the bankrupt court, and the property adjudged to be a part of the estate of the bankrupt, it would be the duty of the State court to carry out and enforce that decision whenever its jurisdiction was invoked. But that is quite a different matter from the State court attempting itself to annul a sale valid under the State law because it was designed to give a preference to a creditor which was prohibited by the bankrupt act.

The bill of sale under which the plaintiff claims was executed April 17, 1875, and actual possession of the property was delivered under it. The property remained in the plaintiff's possession until it was taken on the attachment against Giles by the deputy sheriff

It appears that early in May, Giles, on his own petition, was adjudged a bankrupt, and the marshal took the property from the possession of the deputy sheriff under a warrant from the bankrupt court. The property was afterward sold by the assignee. As before remarked, the court decided that the defendants could not justify the taking and conversion of the property under the attachment; and further held, that the marshal had no right to take it under his warrant, but having taken it and subjected it to the payment of the debts of the bankrupt, if the sale were void under the bankrupt law, no more than nominal damages could be recovered. This view we deem erroneous. It is conceded that the original taking of the property was unlawful, and we perceive no ground for holding that the plaintiff's right to recover its value was affected by the bankrupt proceeding. There are cases which hold that when property has been wrongfully taken by the defendant, the fact that it has been applied to the payment of plaintiff's debt by means of legal process in favor of a third person, may be shown in mitigation of damages. *Cotton v. Reed*, 2 Wis. 458, and cases cited in the opinion; *Kaley v. Shed*, 10 Metc. 317. And had the sale to the plaintiff been annulled by a suit at law or in equity, brought by the assignee, as indicated in *Smith v. Mason*, 14 Wall 419; *Marshall v. Knox*, 16 id. 551, and *Allen v. Massey*, 17 id. 351, then, within the doctrine of *Perry v. Chandler*, 2 Cush. 237, the fact might be shown in evidence in reduction of the damages. But it is evident that the doctrine of these authorities has no application to the case at bar, for the reason that it is not pretended that the property wrongfully taken has been appropriated to the payment of the plaintiff's debt by means of legal process in favor of any creditor of his; nor has the sale to him been avoided by any proper proceeding in the bankrupt court. The marshal had no right to take the property in the manner he did, and the mere fact that the sale was liable to be declared invalid and fraudulent in some suit which might be instituted by the assignee in the bankrupt court, cannot affect the amount of the recovery, or mitigate the damages. The plaintiff is entitled to recover the full value of the property wrongfully taken from his possession. *Wilkinson v. Wait*, 44 Vt. 508.

The judgment of the Circuit Court must, therefore, be reversed, and a *venire de novo* awarded.

Judgment reversed.

Bromley v. Goodrich.

Defendant's counsel moved for a rehearing and called attention to *Bolander v. Gentry*, 36 Cal. 108.

RYAN, C. J. It is enough to say of *Bolander v. Gentry*, 36 Cal. 105, which the learned counsel for the respondent makes the text of his argument for a rehearing, that it quite overlooks the point on which this appeal was decided.

But in defense to the earnestness and ability of the argument, we have carefully re-examined the ground of the decision in *Brigham v. Claflin*, 31 Wis. 607, and in this case; and feel compelled to adhere to the rule governing them both, as the settled law of this court. Our reconsideration of the rule has confirmed us in the views heretofore expressed in support of it; and suggested another aspect of the argument.

It is conceded that the sale under which the appellant claims was valid by the law of this State; but it is claimed that it was void under the bankrupt law.

Section 35 of the bankrupt law provides that if an insolvent, within four months before petition filed to declare him a bankrupt, transfer any of his property with a view of preference, to a creditor chargeable with notice of the vendor's insolvency and of the fraud of the sale upon the law, the sale shall be void; and that the assignee of the bankrupt may recover the property or its value from the vendee.

Probably no words are more inaccurately used in the books than *void* and *voidable*. Statutes not unfrequently declare acts void, which the tenor of their provisions necessarily makes voidable only. Perhaps the best excuse made for such inaccuracy is that of PARKER, C. J., cited and adopted by this court: "Whatever *may be avoided*, may, in good sense, to this purpose, be called void, and the use of the term *void* is not uncommon in the language of statutes and of courts. But in regard to the consequences to third persons, the distinction is highly important, because nothing can be founded upon what is *absolutely void*; whereas, from those which are only voidable, fair titles may flow. These terms have not always been used with nice discrimination; indeed in some books there is a great want of precision in the use of them." *Crocker v. Bellanges*, 6 Wis. 645.

It is quite manifest that it is only as against proceedings in bankruptcy, that the bankrupt act undertakes to void sales made

by insolvents. If Congress had undertaken to give a general rule governing sales, as part of the municipal law of the States, it would have been outside of its authority. The language of the statute plainly shows that Congress intended no such usurpation. The avoidance of the sale and the right of the assignee to recover are dependent; clearly making the avoidance a consequence upon the bankruptcy of the vendor. The statute operates upon sales, not of insolvents but of bankrupts only. If an insolvent, in view of proceedings in bankruptcy against him, which happen not to be taken or not to be entertained by the bankrupt court, make a sale within the conditions of the section, it is quite clear that the bankrupt law would not and could not have any effect to avoid the sale. And if the petition in bankruptcy against the vendor should be taken later than four months after the sale, the bankruptcy would not affect the validity of the sale. In any case, the sale would remain valid under the State law, and the legal title in the vendee, until the vendor be adjudged a bankrupt. And it seems quite clear that the true construction of the bankrupt law makes such sales voidable only, not void, notwithstanding the inaccurate use of the latter word. When avoided, they may be void *ab initio*, though valid until avoidance.

And the mere bankruptcy of the vendor does not determine the question. Several conditions must concur to avoid his sale. It must be made within four months before petition filed; with a view to give a preference; to a creditor having cause to believe the vendor insolvent and the sale in fraud of the law. With full effect given to the language of the bankrupt law, the vendee is entitled to his day in court before his title can be avoided; and it belongs to the judicial function to avoid it, upon proper proof of the necessary conditions, by proper judgment of law. Until so avoided, the sale remains valid. *Crocker v. Bellangee, supra*. And it is voidable, only in favor of the bankruptcy.

It is obvious that the assignee in bankruptcy does not take judicial power to avoid sales, voidable under the bankrupt law. He is merely the ministerial officer of the bankrupt court. He is presumably the proper plaintiff, in the proper proceeding, to avoid such sales. It may or it may not be that the bankrupt court itself has jurisdiction of such proceeding. It may or may not be that such proceeding must be taken in another court, under its authority. These are questions for the Federal courts, not for the State

Bromley v. Goodrich.

courts. But whatever be the proper nature and forum of such proceeding, it is a proceeding by a Federal officer, under Federal authority, to enforce a Federal statute. And it is quite clear that Federal courts have exclusive jurisdiction of it.* It is very certain that the judgment of the proper Federal court avoiding or affirming such a sale as a fraud upon the bankrupt law, would be conclusive on all State courts; while such a judgment of a State court would not be binding on the bankrupt court. The courts of this State take, probably could take, no jurisdiction to administer the bankrupt law or to avoid sales or enforce forfeitures under it. And as no proceeding appears to have been taken under the authority of the bankrupt court, in this case, to execute the bankrupt law by avoiding the sale under which the appellant claims, that it is precisely what the court below assumed to do, and what we are invited to affirm on this appeal: a plain intrusion upon Federal jurisdiction.

Had the proper Federal court, in a proper proceeding, avoided the sale on which this case turns, it would have been the duty and the pleasure of the courts of the State to hold it void. But the State courts cannot assume to supply adjudications under the bankrupt law, which the proper Federal court has failed to make. The sale under which the appellant claims was voidable only, in aid of the bankruptcy only, and has not been avoided by any court having jurisdiction to avoid it.

It was very safe for the learned judge of the court below to say that the bankrupt act is the law of the land and entitled to be respected accordingly. That is equally true of all valid acts of Congress; and of itself was a harmless truism. But when that was followed by the *non sequitur* that it is to be executed, in all its vigor and import, by courts and juries of this State, as fully as any statute of the State, it almost seems to have been forgotten that the law of the land is to be administered only by courts having delegated jurisdiction to administer it. The same remark might as well have been made of the revenue law or other Federal statutes imposing forfeitures and penalties, which we presume the Circuit Courts of this State will hardly amuse their leisure by assuming to administer. Certainly the State courts are created by the Constitution for different purposes and with different jurisdic-

* See on this point, in addition to cases in the Federal courts cited in *Brigham v. Clapp*, 31 Wis. 607; *Gelston v. Hoyt*, 3 Wheat. 246.

State ex rel. Drake v Doyle.

tion. And we may be permitted to suggest that it is an ill example of judicial order, in a Circuit Court, thus cavalierly to set aside a solemn adjudication of this court, like *Brigham v. Claflin*, by a plausibility which might pass for a smartness in a popular speech, but hardly rise to the tone of judicial discussion; very noticeable in so able and learned a judge.

It is not difficult to see how the assumption of jurisdiction by the State courts to enforce penalties and forfeitures under the bankrupt law and other Federal statutes, would lead to conflict of jurisdiction and judicial disorder. It is, perhaps, unfortunate that the Federal Constitution left any ground for concurrent jurisdiction of the Federal with the State courts. It has led to some mischievous confusion of adjudication and some vicious usurpation of jurisdiction, by both Federal and State courts. In this day, this is a great and growing evil. And we propose, in this State, for the sake of judicial order, and of the integrity of the Federal and State governments, to do what we may toward confining the courts of the State to State jurisdiction, and the courts of the United States to Federal jurisdiction.

The motion for a rehearing is overruled.

STATE EX REL. DRAKE V. DOYLE.

(40 Wis. 175.)

Foreign corporations — validity of conditions precedent to a license to transact business in a State — removal of causes to Federal courts — revocation of license.

A State statute required foreign insurance companies, as a condition precedent to receiving a license to do business in the State, to agree not to remove into the United States courts any actions brought against them in the State courts; and enacted that on violation of such agreement by an insurance company it should "be the imperative duty of the secretary of State to revoke its license." *Held*, (1) that the statute was constitutional; and (2) that the secretary might be compelled to revoke the license by mandamus at the relation of any person interested.* (*See note, p. 702.*)

*In *Hartford Fire Ins. Co. v. Doyle*, 8 Cent. L. J. 41, HOPKINS, J., judge of the United States District Court for the Western District of Wisconsin, held the act involved in this case void.

State ex rel. Drake v. Doyle.

PETITION for mandamus to compel Doyle, secretary of State of Wisconsin, to revoke "any authority, or license or certificate," theretofore issued to the Continental Insurance Company, of New York, authorizing said company to transact business in the State. The petition alleged that said insurance company was incorporated under the laws of New York; that in May, 1874, it insured certain property in the State of Wisconsin, loss, if any, payable to this relator; that the property was destroyed by fire; that the company refused to pay the loss, whereupon he brought action to recover the same in the State court, and that thereupon the company applied to have the cause removed into the Circuit Court of the United States, and that it was so removed. That prior to the commencement of said action, the said insurance company had, in compliance with the statute of the State,* executed a certain instrument under seal, agreeing that said company would not remove any cause commenced against it in the State court into the United States Circuit Court, and that said agreement was duly filed with the secretary of State. The petition further alleged that said Doyle, as secretary of State, had full knowledge of the above facts; that a transcript of the proceedings had been served

* Sec. 22, ch. 58, Laws of 1870, provides as follows: "It shall not be lawful for any fire insurance company, association or partnership incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents in this State, shall first appoint an attorney in this State, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted; and any process issued by any court of record in this State, and served upon any such attorney by the proper officer of the county in which such attorney may reside or may be found, shall be deemed a sufficient service of process upon such company; but service of process upon such company may also be made in any other manner now provided by law."

Sec. 3, ch. 13, Laws of 1871, provides as follows: "No officer, agent or sub-agent of any insurance company shall act or aid in any manner in transacting the business of insurance of or with such company, or placing risks, or effecting insurance therein, without first procuring from the secretary of State a certificate of authority so to do for each company for which he proposes to act, which shall state, in substance, that such company is duly authorized to do business in this State under the laws thereof, and that such agent or other

State ex rel. Drake v. Doyle.

upon him, and that he had been requested to revoke the license or certificate granted to said company.

On this petition an alternative mandamus was issued, to which the respondent made return, among other things, that the statute was unconstitutional.

The relator demurred.

C. W. Felker, for relator.

H. M. Finch, for respondent.

RYAN, C. J. [After deciding some minor questions.] IV. It is contended, not that the statute of the State prescribing the condition upon which license shall be granted is a violation of the Federal Constitution, but that it has been so adjudged by the Supreme Court of the United States; and that thereupon and thereby the statute has ceased to have any force

For the purpose, as WAITE, C. J., remarks (20 Wall. 459), of putting foreign insurance companies, licensed to do business in this State, upon an equal footing with its own companies, section 22 of chapter 56 of 1870 requires foreign companies, before license, to

person has duly complied with the laws relating to the agents of such companies. The secretary of State, upon being satisfied of the facts to be stated therein, shall grant such certificate, which, in case of fire, marine or inland companies, shall continue in force until the thirty-first day of January next after the date thereof....unless sooner revoked by the secretary of State for non-compliance with the laws aforesaid, and shall be renewed on said days annually thereafter, as long as the company and its agents continue to comply with said laws."

Sec. 1, ch. 64, Laws of 1872, provides as follows: "If any insurance company or association shall make application to change the venue or remove any suit or action heretofore commenced, or which shall be hereafter commenced, in any court of the State of Wisconsin to the United States Circuit or District Court, or to the Federal court, contrary to the provisions of any law of the State of Wisconsin, or contrary to any agreement it has made and filed, or may make and file, as provided and required by section number twenty-two (22) of chapter fifty-six (56) of the general laws of Wisconsin, for the year A. D. 1870, or any other provision of law now in force in said State, or may hereafter be enacted therein, it shall be the imperative duty of the secretary of State, or other proper State officer, to revoke and recall any authority, or license or certificate to such company to do and to transact any business in the State of Wisconsin; and no renewal, or new license or certificate shall be granted to such company for three years after such revocation, and such company shall therefore (thereafter) be prohibited from transacting any business in the State of Wisconsin, until again duly licensed."

State ex rel. Drake v. Doyle.

file an agreement in the secretary's office, not to remove causes against them from the State to the Federal courts.

In *Morse v. Ins. Co.*, 30 Wis. 496, the insurance company had, in violation of its agreement, petitioned the State court to remove the cause from the State to the Federal court, under the act of Congress. This court held the agreement to be a valid relinquishment of the right of such removal obligatory upon the insurance company, and gave judgment against it. The judgment of this court was taken by writ of error to the Supreme Court of the United States; and that court, in *Ins. Co. v. Morse*, 20 Wall. 445, reversed the judgment of this court, upon the ground that such an agreement did not deprive the insurance company of the right of removal to the Federal court, under the Constitution and laws of the United States.

The question was certainly not free from difficulty; and while we think, with all due deference, that the weight of authority and sound principle sustain the views of this court, it is our duty and pleasure to submit to the decision of the Federal court, on a point unquestionably within its final jurisdiction.

Under that decision, it follows that the jurisdiction of the State court in that case was ousted, upon the presentation of the petition to remove the cause to the Federal court, and that all subsequent proceedings in the State courts were *coram non judice*. *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 15 How. 198; *Ins. Co. v. Dunn*, 19 Wall. 214.

The sole question, therefore, before the Federal court, upon the writ of error in *Ins. Co. v. Morse*, was, whether the right of the insurance company to remove the cause to the Federal court remained, notwithstanding the agreement. Upon that point only is the judgment in that case conclusive on this court; upon that point only is the opinion of that court authoritative with this.

“ This court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. The State of Virginia*, 6 Wheat. 399, this court was much pressed with some portion of its opinion in the case of *Murphy v. Madison*, and Mr. Chief Justice MARSHALL said: ‘ It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they

go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. The cases of *Ex parte Christy*, 3 How. 299, and *Jenness et al. v. Peck*, 7 id. 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains." *Carroll v. Carroll*, 16 How. 275. The rule is elementary, but we choose to give it in the words of the court to whose opinion we consider it presently applicable.

Ins. Co. v. Morse was decided by a divided court. The opinion of the majority, delivered by Mr. Justice HUNT, applies to the agreement of the insurance company not to remove the cause to a Federal court, the general and familiar rule, that parties cannot by contract oust the ordinary courts of their jurisdiction; citing to that effect several cases, English and American; and quoting the rule from Story's Eq., § 670, in these words: "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunal of justice, such as an agreement, in case of any disputes, to refer the same to arbitrators, courts of equity will not, any more than courts of law, interfere to enforce that agreement, but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced."

Having held the rule to be otherwise applicable to the agreement of the insurance company, the opinion proceeds to inquire whether the agreement gains validity from the statute of the State requiring it; and holds that it does not, because the right of removal is given by the Constitution and laws of the United States. And therefore the majority of that court reversed the judgment of this court on the ground that the petition to remove the cause to the Federal court had ousted the jurisdiction of the State court.

So far the opinion deals with the questions involved in the case. Having so held, the opinion had exhausted the question before

State ex rel. Drake v. Doyle.

the court ; had exhausted its appellate jurisdiction to this court; had exhausted its concern with the statute of the State. In its view of the question before it, the only concern of that court with the statute of the State was, whether it could operate to take the agreement out of the general rule held to be applicable to it. The agreement was directly before the court; the statute at best was only before the court collaterally. And we may be pardoned for suggesting that, the validity of the statute not being directly involved in the decision, the declaration that it is unconstitutional overlooked the universal rule of all American courts sanctioned by that court (*Cooper v. Telfair*, 4 Dallas, 14; *Parsons v. Bedford*, 3 Pet. 433; *United States v. Coombs*, 12 id. 72), that courts will avoid an interpretation or application of a statute rendering it unconstitutional; and will hold one so only in plain and peremptory cases. And with the domestic policy of the statute, with the right of the State to refuse license to insurance companies refusing to make the agreement, that court had no concern.

“ This court has no authority to revise the act of [Wisconsin] upon any grounds of justice, policy or consistency to its own Constitution. These are concluded by the decision of the public authorities of the State. The only inquiry for this court is, does the act violate the Constitution of the United States, or the treaties and laws made under it ? ” *Carpenter v. Pennsylvania*, 17 How. 456.

The statute of the State does not assume to prohibit insurance companies taking license under it, from removing actions on its policies from State to Federal courts. It only provides that no insurance company shall be licensed under it, which shall not file an agreement not to remove them. So that the question in *Insurance Company v. Morse* was not whether the statute was in violation of the right of removal, but whether the voluntary agreement of the insurance company was obligatory upon it. The only question upon the statute before the court was, whether it could operate to give validity to the agreement, held to be otherwise invalid. And it is sufficiently plain that the validity of the agreement, and the validity of the statute requiring the agreement, are entirely distinct questions. The invalidity of the agreement has been determined by the court of last resort on the subject; but the statute remains. And we take it that no provision in the Constitution, laws or treaties of the United States is violated by a statute

State ex rel. Drake v. Doyle.

of the State prohibiting the license of the State to foreign corporations to do business within it, upon any condition whatever. The right of the State to refuse such license is absolute; and being absolute, it may be exercised at absolute discretion, not to be questioned or abridged, anywhere, under any pretense. It was within the appellate jurisdiction of the Federal court to refuse effect to the agreement as ousting the jurisdiction of the Federal courts; but it is not within its jurisdiction to hold foreign insurance companies entitled to license without the agreement. It can hold an insurance company not bound by the agreement when made, as repugnant to the Constitution and laws of the United States; but it cannot excuse the agreement as a condition precedent to license under the State statute. So far as the statute stands outside of its appellate jurisdiction to this court, raising a pure question of State policy and economy, in a matter within the absolute pleasure of the State. Conceding the invalidity of the agreement, the statute still prohibits license, within the mere discretion of the State, without the agreement, and the statutory license cannot issue without it. In authorizing voluntary licenses, with absolute right to annex any condition to them, the State may exact agreements morally although not legally binding on the licensees. It may be presumed there is some sense of decency even among corporations. It may be presumed that not every insurance company will voluntarily make such an agreement as a condition of a voluntary and advantageous license, and then deliberately violate it, even with the sanction of the Supreme Court of the United States. In any view such a violation is a scandalous breach of good faith, indicating a disposition to bad faith in all the dealings of the company. And though the agreement be not obligatory in conscience, and to refuse licenses to all insurance companies refusing to execute it. In that view of it, the Federal court has no appellate jurisdiction to this court over the statute, and the declaration that it is unconstitutional was a *brutum fulmen*. To that extent, at least, the State retains power over foreign corporations seeking to do business within it. The statute is indeed inoperative to give validity to the agreement, ousting the jurisdiction of the Federal courts. So the Supreme Court of the United States has decided. But it is operative to prescribe the conditions on which the State, in the exercise of its sovereign authority, sees fit to license foreign corporations within it. That is for this court,

State ex rel. Drake v Doyle.

not that, to determine. No foreign insurance company need come here under the agreement; coming, every foreign insurance company violating the agreement is guilty of a moral fraud upon the State. And, in upholding the statute to this extent, against extrajudicial *dictum* of the Supreme Court of the United States, we may quote in our own behalf the language of one of the great chief justices of that court: "A sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice." *Hannay v. Eve*, 3 Cranch, 242.

The provision in section 22 of chapter 56 of 1870, requiring the agreement as a condition of license, was alone before the court in *Ins. Co. v. Morse*. And, so far, we have considered it by itself. But this writ is applied for, not under that section, but under chapter 64 of 1872. And the two statutes taken together put the whole subject in a view which was not before the court in that case, and could not properly be in any case of its appellate jurisdiction to a State court. The former statute requires the agreement; the latter statute provides for the revocation of any license issued, upon violation of the agreement. And the agreement being invalid to oust the jurisdiction of the Federal courts, the two provisions together are equivalent to one requiring the revocation of a license issued to a foreign insurance company, upon its application to remove an action on its policy from a State to a Federal court.

The statute extended to these foreign insurance companies the privilege of doing business in this State on equal footing with domestic companies. Experience showed their power to harass the citizens of the State doing business with them, by removing actions on their policies from courts of the vicinage to distant and expensive tribunals. Hence the provisions of both statutes. And, conceding to the fullest extent the right of removal of actions commenced, we can see no pretext for questioning the power of the State, in the exercise of its absolute discretion on the subject, to revoke the license of a company exercising the right. The State has power to make its voluntary license subject to forbearance of a right, and revocable upon its exercise. The right may survive the license, but the license cannot survive its exercise. So grants are sometimes made upon condition to forbear a right. It was for the

State ex rel. Drake v. Doyle.

authorities of the State alone to judge that the exercise of the right is an abuse of the privilege of the license. With that question Federal courts have no concern. They can hold, as they have, that the right exists in pending actions, but they have no jurisdiction over the question whether foreign corporations, exercising the right, shall be permitted by the State to do business within it. That is matter of State policy, State law, State jurisdiction.

The distinction between the validity of the agreement and the validity of the statute is readily illustrated. It is quite clear that the secretary of State takes no authority, under the statute, to license a foreign insurance company not executing the agreement. That is a condition precedent to his authority. This court would assuredly refuse to compel him to act in disregard of the statute which confers his authority. And we take it that the Supreme Court of the United States would hardly claim appellate jurisdiction to review our decision, or to compel a State officer to act officially for the State, in disregard of the letter of his authority, on the ground that the agreement, when executed, is inoperative to oust the jurisdiction of the Federal court.

We have hitherto considered the agreement in the light in which it is held by the opinion in *Ins. Co. v. Morse*. But, with great deference, we are unable to consider the construction of the agreement there expressed to be correct, even within the views of the court itself. It is held to be repugnant to the Constitution and laws of the United States. But an agreement not to remove a cause from a State to a Federal court, though it will not be enforced as obligatory against removal, does not appear to be in itself repugnant to any law. The party may keep it in good faith, without offense against the law. Courts will not, indeed, enforce it; but, in the language of Judge STORY, leave the parties to their own good pleasure in regard to it. Had the insurance company, in that case, complied with the agreement, and not removed the cause, it would have been guilty of no violation of the Constitution or laws of the United States. In the view taken of it by the Supreme Court, it is ineffectual but not illegal. We have seen no case holding such an agreement illegal, though it has been sometimes called nugatory. In the leading case of *Kill v. Hollister*, 1 Wilson, 129, it was held that an agreement to arbitrate did not bar the action, because there had been no submission under it; the court intimating that a submission under it would have been a bar. And

State ex rel. Drake v. Doyle.

it has been held that, though such an agreement will not defeat an action brought under it, yet an action will lie on it for breach of it. *Livingston v. Ralli*, 5 Ell. & Bl. 132. See, also, *Nute v. Ins. Co.*, 6 Gray, 174; *Hobbs v. Ins. Co.*, 56 Me. 417.

It appears to us to be very plain that the statute of 1870 is a valid enactment; that its validity was not involved in the decision of *Ins. Co. v. Morse*; that its validity, as a limitation upon the issue of licenses under State authority, was not within the appellate jurisdiction of the court; and that the declaration, in the opinion, that it is repugnant to the Constitution and laws of the United States, and, therefore, void, is but an improvident and erroneous expression of the learned judge who delivered the opinion. With all due deference, we may be permitted to say of it what Lord MANSFIELD said of a *dictum* of Chief Justice HOLT: "That is an *obiter* saying only, and not a resolution or determination of the court, or a direct, solemn opinion of the great judge from whom it dropped." *Saunderson v. Rowles*, 4 Burr. 2064.

The opinion proceeds to discuss the relations of foreign corporations to the State, in a scope wholly foreign to the judgment in the case, and in a tone inconsistent with decided cases in that court; and, therefore, so far, of no authority there or here. It is sufficient for this case that that great tribunal has frequently and uniformly held that the corporations of one State have no right to migrate to another, there to exercise their franchises, except upon the assent of such other State; and that such assent may be granted upon such terms and conditions as the State granting it may think proper to impose. *Insurance Company v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 18 id. 566; *Osborne v. Mobile*, 16 id. 479.

Paul v. Virginia was the case of an insurance company of New York, doing business in Virginia under a statute of the latter State prohibiting foreign insurance companies from doing business there without license to be granted upon conditions precedent. It was decided as late as 1868. And the court uses this language:

"The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty?' The recognition of its existence even by other States—a comity which is never extended where the existence of

Milwaukee Industrial School v. Supervisor of Milwaukee County.

the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote public interest. The whole matter rests in their discretion." And this doctrine is expressly affirmed in *Ducat v. Chicago*, a like case in 1870.

The doctrine is so sound in itself, and so many of the decisions of that court on other subjects would be disturbed or subverted by a departure from it, that we feel safe in holding it to be the settled law of the Federal Supreme Court, notwithstanding intimations to the contrary in the opinion in *Insurance Company v. Morse*; another reason for regarding these as not sufficiently considered, as is apt to be the case with all *obiter dicta*.

Petition for mandamus granted.

NOTE.—The opinion further examines at great length the jurisdiction of the Circuit Court of the United States of a suit to enjoin the secretary of State from annulling and revoking the license granted to the respondent the conclusion being reached and the court holding that the Federal court had no such jurisdiction. Owing to the length of this portion of the opinion it has not been thought advisable to include it.—ED. AM. REP.

MILWAUKEE INDUSTRIAL SCHOOL V. SUPERVISOR OF MILWAUKEE COUNTY.

(40 Wis. 333.)

Constitutional law—parent and child—commitment of pauper children to industrial schools.

A statute enacted that children under a certain age, who were inmates of poor-houses, or who were abandoned by their parents, or who were without means of subsistence, should be committed to industrial schools during minority. *Held*, not unconstitutional as authorizing imprisonment without due process of law.

Seemle, that the parent or guardian of a child so committed would not be precluded by the commitment from asserting right to the custody or care of the child on proof that the cause of commitment no longer existed.

Milwaukee Industrial School v. Supervisor of Milwaukee County.

ACTION by the Milwaukee Industrial School, to recover of the supervisors of Milwaukee county, compensation for the board and tuition of certain children committed to plaintiff's care under a decree of the municipal court of Milwaukee, which recited that complaint had been made as the statute required; that the children were inmates of the poor-house of Milwaukee county; and committing them to plaintiff's school until they should respectively attain to the age of twenty-one years, or be sooner discharged as provided by statute. It was admitted by counsel for the plaintiff that all children in said school were subject to the same rules and discipline; that one child had been committed to the school for larceny; that another had been committed for being an inmate of a house of ill-fame; and that both of these were confined there with the children in question.

Verdict for the plaintiff.

Defendant appealed.

F. W. Cotzhausen, for appellant.

J. P. C. Cottrill, for respondent. The law is valid as a mere police regulation. The legislature has legislated for spendthrifts, insane persons, vagrants and drunkards, and has established an industrial school for boys, and a soldiers' orphans' home. No question has hitherto been made of the validity of any such laws. They are common to all the States in substance, and the law in question is of like character. See, for decisions under similar laws, *Ex parte Crouse*, 4 Whart. 9; *People v. Governor, etc.*, 18 How. Pr. 409; *Roth v. House of Refuge*, 31 Md. 329; *Prescott v. State*, 19 Ohio St. 184; S. C., 2 Am. Rep. 388. To the objection that the act was void because violating the rule as to due process of law, counsel cited *Rowan v. State*, 31 Wis. 129.

RYAN, C. J. We live in a time of inquiry and innovation, when many things having the sanction of the time are questioned, and many novelties jarring with long accepted theories are proposed. In political science, there are those who would reduce government to a mere skeleton of absolutely necessary powers, purely political; and those who favor paternal government, recognizing in the sovereignty much of the authority of patriarchal rule. All this is seen chiefly in political discussions; but the late reports show that these conflicting theories are finding their way into judicial tribu-

Milwaukee Industrial School v. Supervisor of Milwaukee County.

nals. The business of the courts, however, is not correct, but to administer the existing system of government.

Some authorities cited in this case, and the logical tendency of part of the argument, would go to question the right of the State to make involuntary provision for the care of the destitute, whom misfortune or folly have rendered incapable of caring for themselves. But the political necessity and duty of the sovereignty to make provision for the care of subjects or citizens, unable for any cause to take care of themselves, and destitute of other care, has been too long recognized in all civilized countries, too well established under the State governments of this country, to be regarded as an open question. All public asylums, here and elsewhere in the country, for the poor, for the insane, for orphans, for the helpless and destitute by any cause, are witnesses to the political necessity of public charity. And we assume, as a principle underlying every consideration in this case, that it is the duty and policy of the State to provide efficient means, in its discretion, for the care of all destitute and helpless persons within it; that public charity, in such cases, is a public necessity.

In fulfilling this duty, as in all things else, the power of the legislature is subject to all positive provisions of the Constitution; perhaps to what Judge REDFIELD calls the abstractions of State Constitutions; and to those natural and fundamental principles of right and justice, which are recognized in all civilized countries, and enter into all civilized governments. And the main question in this case is, whether the industrial school act (ch. 325 of 1875), in its essential provisions, is in conflict with any of these.

We confess that we approach the consideration of the statute with a strong desire to uphold it. Theoretically, the provision for the support of the poor is very well. Practically, poor-houses are perhaps often, sometimes certainly, administered with as little attention to the comfort, and as little respect for the persons of their inmates, as some of our prisons. They are not fit places for children; without means of intellectual, moral or religious instruction, or for the peculiar care needed by children, especially children within the age of nurture. And it is manifestly better for poor children that they should be supported in some other asylum, where they may have fitting culture and better care; where some person or body may stand to them *in loco parentis*, and measurably discharge toward them the parental duties of nurture and education.

Milwaukee Industrial School v. Supervisor of Milwaukee County.

If poor-houses, certainly common jails and penitentiaries are unfit places for the confinement of children, even of ordinarily vicious children. In these it cannot be said that children are altogether without opportunities of education ; but it is vicious education. All experience has shown the tendency of prisons for crime to aggravate the depravity of less guilty adult prisoners. The association with practiced criminals generally to be found in such places, which is almost necessary to confinement within them, must inevitably expose children to corrupting influences which few children have character to resist. And when children must be confined for crime, common humanity to them, common regard for the future welfare of the State, requires, in many cases, that they should be sent to some place of detention more appropriate for them, where they may have a reasonable opportunity of becoming better, instead of worse, by their confinement ; where the prison authorities are not their mere jailers, but are charged with parental duty as well as with parental authority ; and where education for good is not only not excluded, but is made a condition of their restraint.

Such were, doubtless, the views of the legislature in passing chapter 325 of 1875, and chapter 142 of 1876. The latter act makes it the duty of the poor authorities throughout the State to place healthy children as paupers, not in poor-houses, but in families, orphan asylums, or other appropriate institutions. The former act had already authorized the incorporation of industrial schools in every county, for the care and support of destitute children, and for the confinement of children convicted of crime. There might be constitutional difficulties or defects, in general or special provisions, in statutes of this character ; but we think that even Judge REDFIELD would readily have recognized, not only their humanity, but their propriety, as reforms strictly within a proper legislative function, and not a meddlesome interference with private discretion or discipline. And we cannot forbear the remark that the general scope of these statutes, whatever defects there may be in their details, reflects honor upon the legislative bodies which passed them, and upon the State.

Notwithstanding this prepossession in favor of the statute before us, it is our duty to test all its provisions involved in this case, by the letter and spirit of the Constitution, and to hold the restraints and principles of that instrument sacred, as against any provisions of any act of the legislature, however humane or benevolent.

Milwaukee Industrial School v. Supervisor of Milwaukee County.

Sections 1, 2, 3 and 9 provide for the incorporation and organization of industrial schools. Section 4 subjects the corporations to the same visitation and inspection of the State board of charities and reform as other State charitable and penal institutions.

Section 5 authorizes courts and officers having criminal jurisdiction, judges of courts of record and mayors of cities, to cause to be brought before them children between the ages and of the classes prescribed by the section.

The power conferred is clearly judicial, and cannot be exercised by mayors of cities (*Attorney-General v. McDonald*, 3 Wis. 805); probably not by judges of courts of record at chambers. *Re Kindling*, 39 Wis. 35. Any defect of jurisdiction in them, however, could not affect the authority conferred on courts.

The provisions of the section include any male child under twelve, and female child under sixteen, years of age, coming within either of these conditions: "That is begging or receiving alms, whether actually or under pretense of selling or offering for sale any thing, or being in any public street or place for the purpose of begging or receiving alms; or that is found wandering and not having any home or settled place of abode, proper guardianship or means of subsistence; or is found destitute, either by being an orphan, or having a parent or parents who is undergoing imprisonment, or otherwise; or that frequents the company of reputed thieves, or of lewd, wanton or lascivious persons in speech or behavior, or notorious resorts of bad characters; or that is found wandering in streets, alleys or public places, and belonging to that class of children called 'ragpickers;' or that is an inmate of any house of ill-fame or poor-house, whether in company with its parent or parents or otherwise; or who has been abandoned in any way by his parent or parents or guardians; or who is without means of subsistence or support."

There is diversity of conditions in these several classifications, and some of them were severely criticised on the argument and may perhaps be open to criticism. In this case we have only to do with the provision relating to inmates of poor-houses. And, without indicating any opinion as to the other classes of children embraced in the section, it is sufficient to say here, that the provisions of the statute, as they affect each class of children, are independent. The statute might be inoperative as to one class or classes, and valid as to other class or classes. *Lynch v. The Economy*, 27 Wis. 69.

Milwaukee Industrial School v. Supervisor of Milwaukee County.

Courts and officers before whom a child within the conditions of the sections may be brought, "if satisfied on inquiry of the fact, and that the welfare of such child will be promoted thereby, may order such child to be sent to an industrial school in his own county, if there be one, and if not, to one in another county; and may direct such child to be kept and maintained in such school, at the expense of the county, until twenty-one years of age, or earlier discharged, as provided later in the act." The rest of the section makes similar provision for sending children convicted of crime to such schools.

It seems to be assumed on the argument, that the power of courts to send children to these schools under either branch of the provision was peremptory. But we think that it rests clearly in discretion, controlled by the welfare of the child. And we should have been inclined to hold the term of commitment, during minority, to be also discretionary (*Cutler v. Howard*, 9 Wis. 309; *Market Banks v. Hogan*, 21 id. 317; *Dutcher v. Dutcher*, 39 id. 651), if the language of this section had not been controlled by the provision in section 7, that all sentences and commitments shall be until majority.

Section 6 authorizes industrial schools to receive children so sent to them, and thereupon to take exclusive custody, care and guardianship of such children, until discharged therefrom. The rest of the section is confined to provisions authorizing children to be sent to these schools, under certain conditions, by authority of their parents; provisions not involved in the consideration of this case. Section 7 authorizes the officers of the school to discharge children sent to them by judicial authority, before majority, when in their judgment it shall be for the interest of the children. Section 8 gives authority to the officers of the school to detain children sent to them by judicial authority; makes provision for the proper education of the children in the schools, and gives discretion to the officers to bind out the children as apprentices, or to give them to suitable persons for adoption during minority.

It was strongly objected to the statute, that it authorizes the same disposition of children destitute by misfortune, and of children convicted of crime; committing them alike to these schools during minority, there to associate together. It must be remembered, however, that this evil, if evil it be, is subject to judicial discretion, and that in sentencing criminal children courts will

Milwaukee Industrial School v. Supervisor of Milwaukee County.

not overlook the discretion to confine them in ordinary prisons or in these schools, or the degree of depravity of convicted children, or the liability of destitute children in these schools to be demoralized by association. Children guilty of crime are not always, perhaps not often, so depraved as to make their presence in such schools dangerous to their associates. The State, providing for children dependent upon it, whether from indigence or crime, has an essential discretion in the manner of doing so. And it appears to have been in the mind of the legislature, that children guilty of accidental offenses might be more sure to gain than children destitute by misfortune would be to lose by the association, under the careful discipline provided by the act, subject to the supervision of the State board of charities and reform. But, if the objection were as grave as represented, it would be a defect of detail only, not of power; a blemish, not surprising in the infancy of so benign a reform, readily to be obviated in time by amendment of the statute.

Such commitments of destitute children were stigmatized as the punishment of poverty as a crime. We have already sufficiently expressed our opinion that the removal of children from poor-houses to these schools is mercy, not punishment.

Such commitments of poor children were denounced as an arbitrary interference with the natural affections and relations of parent and child; as an arbitrary invasion of natural and inalienable rights of both parent and child. As will be presently seen, we cannot consider the statute as authorizing the separation of parent and child, when the parent is able and willing to perform his duty to the child. And when a parent is unable or unwilling to provide for his child, and leaves the child dependent on the charity of the State, we are at a loss to comprehend the right of the parent to object to the form which the State gives to its charity, with intelligent regard for the welfare of the child. And, as regards the right of the child infringed by such considerate benevolence exercised toward it by the State, on which misfortune has made it dependent, we can only say that we have little consideration for the inalienable right of idleness, ignorance and vice, or for the care or want of care which fosters it.

The gravest objection, however, made to the statute is, that the commitment of a child to one of these schools until majority, except for crime, operates as an imprisonment of the child for that

Milwaukee Industrial School v. Supervisor of Milwaukee County.

period, without due process of law, and that the statute authorizing it is, therefore, a positive violation of the Constitution. We will consider this objection separately, as it affects the right of the child, and as it affects the right of the parent.

And, in the first place, we cannot understand that the detention of the child at one of these schools should be considered as imprisonment, any more than its detention in the poor-house ; any more than the detention of any child at any boarding school, standing, for the time, *in loco parentis* to the child. Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of the parental power of restraint over children committed to it. And when the State, as *parens patriæ*, is compelled by the misfortune of a child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the State delegates the nurture and education of the child. The State does not, indeed we might say could not, intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child, arising from want or default of parents. And, in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child, no more than the tenderest parent exercising like power of restraint over children. This seems too plain to need authority ; but the cases cited for the respondent, and others, amply sustain our view.

In the second place, the statute, certainly so far as it is involved here, does not go on failure in the measure of support or education by the parent, on some nice fault-finding with the course of the parent with the child, as the court appeared to think that the Illinois statute did, in *People v. Turner*, 55 Ill. 280 ; S. C., 8 Am. Rep. 645. It goes on the total failure of the parent to provide for the child. And it is difficult to comprehend the right of a parent to complain, that the discharge by the State of his own duty to his child, which he has wholly failed to perform, is an imprisonment of the child as against his parental right in it.

It was argued, however, that the disability of a parent to support his child might well be accidental or temporary ; and that the commitment until majority would operate as an imprisonment of the child, as against both parent and child, in cases where the parent should afterward be able and willing to resume the nur-

Milwaukee Industrial School v. Supervisor of Milwaukee County.

ture and education of the child. This objection would have great weight, if it would not be fatal to the validity of the statute, were it well founded. We could not think it removed by the discretionary authority of the officers of these schools, to discharge the child in such a case. We are of course not speaking of commitments for crime, but only of commitments for the causes which may be classed as misfortune. In the latter case, we should be very reluctant to hold the power of the State to survive the disability or default of the parent. And the right of the parent to resume the care of his child, in proper circumstances, should not be dependent on the discretion of the school officers.

But we cannot consider the statute, in its true construction, open to the objection. We cannot think that it was intended to foreclose the right of a parent, when competent, to resume the custody and care of his child. In this respect, there is a significant difference between it and the statute before the court in *People v. Turner*. That statute provided for process against the parent or guardian of the child ; making them parties to the proceeding and apparently bound by it. The statute before us carefully avoids that difficulty ; and operates, so to speak, upon the child *in personam*, without citing the parent or guardian, without any color of intent to bind the parent or guardian by the proceeding or by the commitment. It appears to us quite obvious, upon familiar principles, that the parent or guardian is not precluded by the commitment from asserting any right to the custody and care of the child, which he may be afterward able to establish. When a parent or other proper guardian should be able to show that the disability or default on which the child's commitment proceeded was accidental or temporary, and no longer exists, and that he is, in the language of sec. 5, ch. 112, R. S., not otherwise unsuitable for the custody of the child, his right to the custody should prevail over the commitment to which he was not a party. In such a case, if the officers of a school should refuse to surrender a child, no court would hesitate to restore the child to the care of the parent or guardian. The commitment during minority binds the child only; not the parent or guardian, when competent to fulfill toward the child the duties assumed by the State. It is conclusive as between the school and the child ; but not as between the school and the parent or guardian. The statute is a humane one, and should not be bent to a construction inconsistent with one of the dearest

rights of humanity. It is our duty to give it a construction, if we can, to give it effect. And we find no difficulty in giving it this construction, which seems to us to have been in the mind of the legislature when it was framed.

We have already given reasons for calling the statute humane ; but there is another worthy of notice, as showing the considerate and benevolent spirit in which it was framed. Women alone, or women and men, but not men alone, may incorporate themselves under the statute. Thus no industrial school can be without the sex which is by nature best qualified for the nurture of children. Such charities are best committed to women, in whole or in part. And in such lies the truest and noblest scope for the public activities of women, in the time which they can spare from the primary domestic duties. Such a statute, so framed and so guarded, is not an arbitrary assumption of meddlesome authority, outside of the scope of the proper function of legislation ; but is evidence that public charity is here losing the offensive and oppressive character sometimes attributed to it.

The case of *People v. Turner* appears to turn on the question of compulsory education, a very different question from that here. We are not prepared to say that we might not decide a similar case, under a similar statute, in the same way. But there is much said in the opinion inconsistent with some of the views which we have expressed, to which we could not assent, and which has failed to change our views of this case. We are greatly interested in the note appended to that case, and to which we were specially referred (10 Am. Law Reg. [N.S.] 372) by that great jurist and gifted man, the late Chief Justice REDFIELD. But it appears to us that, though his approval of the decision is unqualified, his approval of the opinion is less so. The burden of his comments is against meddlesome legislative interference in private relations and private duties, under the name of reform ; against theories tending greatly or wholly to substitute the authority of the State, as *parens patriæ*, for parental authority and domestic discipline. With much that he says on this topic, we might cordially agree. And we think that none of the views which he expresses are in conflict with ours of this case. Some of his views struck us so forcibly as to lead us into the remarks made in the opening of this opinion. There is, in his suggestions, instruction to all courts to distinguish, as we trust we have distinguished in this case, between

Richardson v. Johnson.

the proper scope of legislative authority, and mischievous meddling by statute with matters of purely private concern, and especially with the natural and sacred relation of parent and child.

It is so apparent to us that this statute does not go to disturb the uniformity of county government, that we do not think it necessary to discuss it. We did not understand counsel as seriously relying upon that point.

The judgment of the court below is affirmed.

Judgment affirmed.

RICHARDSON V. JOHNSON.

(41 Wis. 100.)

Statute of frauds — parol agreement to rescind a written assignment.

Plaintiff made an absolute written assignment of his interest in a land contract. *Held*, that parol evidence was not admissible to prove that the assignment was afterward rescinded or agreed to be held as security for debts due from the assignor to the assignee.

ACTION for money. In September, 1872, plaintiff made a written assignment, absolute in form, of his interest in a certain land contract then held by him, to the defendant, and brought this action to recover a part of the alleged consideration therefor. Defendant answered that, after such sale and assignment was executed, it was agreed between him and plaintiff, that the contract of sale should be rescinded, and that the assignment should be held by the defendant as security for the debt due from plaintiff to him.

Verdict and judgment for plaintiff. Defendant appealed.

Park & Jones and G. W. Cate & H. W. Lee, for appellant.

O. H. Lamoreux and James O. Raymond, for respondents.

COLE, J. The controlling question in this case arises under the statute of frauds. It is admitted that the plaintiff made an absolute sale of all his right and interest in the land contract in the first instance. And it is further admitted that he executed the written assignment for the purpose of transferring to the defend-

Richardson v. Johnson.

ant the contract according to the real intent of the parties at the time. Both parties understood that the sale and assignment were unconditional and absolute, made for the consideration expressed. Now it is claimed by the defendant — and this is the ground upon which the defense rests, — that sometime subsequent to this transaction there was a parol agreement entered into, by which it was agreed that the assignment should be rescinded, or that the contract should be taken and held by the defendant as security for whatever the plaintiff then owed or might thereafter owe him for supplies advanced ; and the question is, could this agreement be established by parol evidence ? The Circuit Court held that it was not competent to prove the agreement by parol, unless, in making the sale and assignment, the plaintiff had actually made some false representation in regard to the taxes, or was guilty of some fraud which impeached the sale.

In a number of cases which have come before this court, the doctrine has been laid down, that parol proof was admissible to show that a deed absolute on its face was in fact only a mortgage. *Sweet v. Mitchell*, 15 Wis. 642 ; *Kent v. Agard*, 24 id. 378 ; *Kent v. Lasley*, id. 654 ; *Wilcox v. Bates*, 26 id. 466. But in these and other like cases it was apparent that the conveyance, though absolute in form, was really intended to stand as a security for the payment of a debt, and therefore the courts impressed upon it the character of a mortgage. The correctness of the rule, however, admitting parol evidence to show that this was the nature of the deed, has often been questioned on principle (PAINE, J., in *Sweet v. Mitchell*, *supra*); but confessedly the doctrine is too firmly established to be changed by the courts. But it is obvious that the doctrine of these cases does not extend to the case where the parties, by some subsequent parol agreement, attempt to convert an absolute deed, or an absolute assignment of a land contract, into a conditional one. Here it is said that, subsequent to the assignment of the contract, the parties agreed that the same should be retained and held by the defendant as a security merely for his demands, and that it is competent by parol evidence thus to change the nature of the assignment. The parol agreement, of course, directly contradicts the assignment, by converting an absolute assignment into a conditional one, and transfers to the plaintiff an equitable interest in the lands embraced in the contract. “ This is going much beyond the rule admitting parol evidence to show

Hoyt v. Hudson.

that an absolute deed was given as a security and thus convert it into a mortgage. * * Believing as we do, that the rule itself was a violation of principle and sound policy, while we have regarded it as our duty to follow it so far as it may be fairly regarded as established by authorities, we are not inclined to extend it any further." PAINE, J., in *Sweet v. Mitchell*. We, therefore, think it incompetent by parol evidence to show that the parties subsequently agreed to convert the assignment into a conditional one. Such an agreement would be void under the statute of frauds.

Without dwelling on the exceptions taken to the charge of the court, and to the refusals to give the instructions asked on the part of the defendant, we will say that the rulings of the court on those points appear to us quite as favorable to the defendant as the law would allow. We have examined all the authorities cited on the brief of the counsel for the defendant, but find nothing in them in conflict with the views above expressed. *Dearborn v. Cross*, 7 Cow. 48, is the only case which has any bearing on the question before us tending to sustain the position that parol evidence was admissible to change the nature of the assignment; but the facts of that case are so different as to render the decision inapplicable.

We do not think there was any error of which the defendant can complain in the direction of the Circuit Court as to the amount of the recovery, provided the jury found in favor of the plaintiff. The amount was really settled by the pleadings and the undisputed testimony in the case.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

HOYT V. HUDSON.

(41 Wis. 105.)

Contributory negligence — burden of proof.

In an action to recover for injuries caused by defendant's negligence, the burden is not on the plaintiff to prove that he was in the exercise of due care, but if the defendant rests his defense on the contributory negligence of the plaintiff, the burden is on him to prove such negligence.

Hoyt v. Hudson.

ACTION to recover damages for injuries to plaintiff caused by the alleged negligence of the defendant in permitting snow and ice to collect and remain on a sidewalk in defendant's city. The defendant denied negligence and alleged negligence of plaintiff.

Upon the trial plaintiff proved that he slipped on the said sidewalk and broke his leg, and gave evidence tending to show defendant's negligence.

At defendant's request the jury was charged that the burden of proving the absence of contributory negligence was on the plaintiff.

The jury returned a verdict for the defendant, and from the judgment entered thereon the plaintiff appealed.

Baker & Spooner and S. U. Pinney, for appellant.

John E. Glover and L. S. Dixon, for respondent, cited Chamberlain v. R. R. Co., 7 Wis. 425, 431; Dressler v. Davis, id. 527; M. & C. R. R. Co. v. Hunter, 11 id. 160; Achtenhagen v. Watertown, 18 id. 231; Langhoff v. Railway Co., 19 id. 491; S. C., 23 id. 43; Potter v. Railway Co., 21 id. 372; Cunningham v. Lyness, 22 id. 245; Cornelius v. Appleton, id. 635; Mayo v. R. R., 104 Mass. 140; Johnson v. R. R. Co., 20 N. Y. 73; Marble v. Wooster, 4 Gray, 401; Murdock v. Warwick, id. 178; Smith v. Smith, 2 Pick. 621; Lane v. Crombie, 12 id. 177; Adams v. Carlisle, 21 id. 147; Murphy v. Deane, 101 Mass. 455, 463; Allyn v. R. R. Co., 105 id. 77; Wheelock v. R. R. Co., id. 203; Hickey v. R. R. Co., 14 Allen, 429, 431; Todd v. R. R. Co., 7 id. 207.

LYON, J. In the record before us we find no affirmative evidence from which the jury could properly find that the plaintiff was guilty of any negligence which contributed proximately to cause the injury of which he complains. The jury were instructed, however, that the burden was upon the plaintiff to prove that he was in the exercise of due care, when injured. Inasmuch as the plaintiff failed to make any such proof, if the instruction is correct, the jury should have been directed to return a verdict for the defendant. But the learned circuit judge further instructed the jury that if the circumstances under which the injury was received, as proved, show nothing in the acts or omissions of the plaintiff to which the injury might be attributed, in whole or in part, "the inference of due care may be drawn from the absence of all appearance of fault." That is to say, the jury were first told that the

burden was upon the plaintiff to prove that he was in the exercise of due care when injured ; and then, that they were at liberty to infer from his entire failure to introduce any evidence on the subject, that he did exercise due care. This involves the absurdity of proving a fact by failing to prove it. Such an *onus probandi* is incomprehensible to us. *See Milwaukee & Chicago R. R. Co. v. Hunter*, 11 Wis. 160.

It should be stated, however, that the instructions are fully sustained by the late case of *Ryerson v. Abington*, 102 Mass. 526, and by other decisions of that court. But we cannot adopt a decision which involves so manifest an absurdity, though made (as that was) by one of the ablest courts in the country. The common sense view of the subject is, that if the burden of proving his own due care to avoid the injury is upon the plaintiff, he must prove such care, either by direct evidence, or by showing *res gestæ* which exclude fault on his part, or he must fail in the action. But if the burden is upon the defendant to prove that the plaintiff was guilty of contributory negligence, and there is nothing in the evidence tending to show such negligence, the court shall hold, as a proposition of law, that the plaintiff was free from fault, and it is error to submit the question to the jury.

Sufficient has been said to show that the important question in this case is, was the *onus* upon the plaintiff to prove that, when injured, he was in the exercise of proper care to avoid the injury, or was it upon the defendant to prove that the plaintiff was guilty of some negligence which contributed proximately to the injury of which he complained ? If the *onus* was upon the plaintiff, he failed to meet its requirements, and the verdict and judgment were properly for the defendant; but if upon the defendant, the defense of contributory negligence was not established, and the action could not properly be defeated on that ground. But the action may have been defeated on that ground alone. It cannot be determined from the record that it was not. Hence, if the court erred in the instructions—if the *onus probandi* was upon the defendant, the error is material, and the judgment must be reversed.

In *Chamberlain v. R. R. Co.*, 7 Wis. 425, and *Dressler v. Davis*, id. 527, this court held that in an action for injuries caused by negligence the burden is upon the plaintiff to show himself free from contributory fault. This rule was vigorously assailed as unsound

Hoyt v. Hudson.

in principle by the late Mr. Justice PAINE, in *R. R. Co. v. Hunter*, 11 Wis. 160 ; but it does not seem to have been overturned. Yet in *Achtenhagen v. Watertown*, 18 id. 331, DIXON, C. J., seems to concede that the rule no longer prevails in this State. Since *R. R. Co. v. Hunter*, we are not aware that the subject has been discussed or considered here. The question is not one to which the rule *stare decisis* is applicable ; and in view of the difference of opinion which members of this court have entertained in regard to it at different times, we feel at liberty to consider and determine the question on the merits, untrammelled by the earlier decisions, or by the later opinions of the court or any justice thereof, in opposition thereto.

It has been held in Massachusetts and several other States, that in actions of this kind the plaintiff must prove that he was free from contributory fault, or fail in his action. These decisions go upon the ground that there can be no recovery unless two conditions concur, to wit, negligence of the defendant and freedom of the plaintiff from contributory fault ; and that it is incumbent on the plaintiff to show the existence of both conditions.

The same proposition may be stated in another form. The defendant is only liable to respond in damages for an injury caused by his negligence. But if the negligence of the plaintiff concurred with that of the defendant to produce the injury, it cannot correctly be said that the same was caused by the negligence of the defendant. The meaning of the rule is, that to render the defendant liable, the injury must be the result of his negligence alone. Hence, to establish a cause of action, the plaintiff must show that the negligence of the defendant was the sole proximate cause of the injury ; and to do this he must necessarily prove himself free from contributory fault.

Many of the cases which hold the above doctrine will be found cited in the notes to sections 33 and 34 of Shearman & Redfield on Negligence, and in the brief of counsel for the defendant.

On the other hand, the contrary doctrine is maintained in many cases, some of which are cited in the brief of counsel for the plaintiff and in the above notes in Shearman & Redfield. These cases hold that if the negligence of the plaintiff concurred in producing the injury complained of, that is purely matter of defense, and hence the burden of proving it is upon the defendant. This is the view taken by Judge DUER in *Johnson v. The Hudson River R.*

R. Co., 5 Duer, 21 ; and that able judge rested his opinion mainly on two grounds : 1. He held that in the absence of proof there is no presumption that the person injured was guilty of negligence which contributed to the injury, any more than there is a like presumption that he whose act or omission caused the injury was guilty of negligence. And inasmuch as the plaintiff must prove affirmatively that the act or omission of the defendant which resulted in the injury, was negligent, before he can recover, so in like manner the defendant must prove affirmatively that the act or omission of the plaintiff contributed proximately to the injury, in order to defeat the action on that ground. 2. He further held that no averment is required in the complaint in such an action that the plaintiff, when injured, was in the exercise of proper care and caution to avoid the injury ; and, from the elementary rule that every fact is necessary to be averred in the complaint which the plaintiff is bound to prove in order to maintain his action, he draws the conclusion that the plaintiff in such an action is not bound to prove in the first instance his own freedom from contributory fault ; in other words, that the *onus probandi* is not upon him to disprove his own negligence, but is upon the defendant to prove such negligence.

In the elementary treatise above referred to (Shearman & Redfield on Negligence), the authors agree with Judge DUER, and, discussing the rule of the cases which hold the *onus* to be upon the plaintiff to prove his freedom from contributory fault, they say : “If this broad rule is adopted, even if we distinguish such defenses as payment, release, satisfaction, etc., as relating to facts subsequent to the act complained of, we cannot see upon what ground the plaintiff is to be excused from proving that he is not an alien enemy, if war exists, or that he was not in a State prison, or that the defendant was not acting under the authority of any statute in what he did, or, in cases where the defendant would not be responsible if he was a mere agent, that he was not acting as an agent. And, at any rate, what possible ground of distinction can there be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto* ? Yet we are not aware of any case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault.”

State v. Crowley.

It seems to us that the reasons in favor of the rule which casts the burden of proof upon the defendant are the stronger and better reasons ; and that such rule rests upon sound legal principles, and ought to prevail in this State. We, therefore, hold that, in the absence of any evidence tending to show that the plaintiff was chargeable with negligence contributing to the injury of which he complains, the presumption of law is that he was free from such negligence, and the burden was upon the defendant to prove such contributory fault, if the same was relied upon as a defense.

The rule here adopted does not apply to a case in which the proofs on behalf of the plaintiff show, or tend to show, his contributory negligence. If such negligence conclusively appears, the court will nonsuit the plaintiff, or direct the jury to find for the defendant ; if the evidence only tends to show such contributory negligence, the question must go to the jury, to be determined, like any other question of fact, upon a preponderance of the evidence.

Inasmuch as the instructions were predicated upon an erroneous rule of law, the judgment of the Circuit Court must be reversed. We do not deem it necessary to determine the other questions argued at the bar.

Judgment reversed, and cause remanded for a new trial.

STATE V. CROWLEY.

(41 Wis. 271.)

*Conspiracy — sufficiency of indictment — what constitutes criminal conspiracy—
must be against an innocent person*

An indictment charging a conspiracy to do a lawful act by criminal means, must particularly set forth the means ; but where the charge is a conspiracy to do an act in itself unlawful, either at common law or by statute, as to obtain money by false pretenses, and by privy tokens and devices, the means need not be specifically stated.

A conspiracy between two persons to defraud a third, in an unlawful enterprise in which they are all joined, is not criminal, because conspiracy is not criminal unless against an innocent person. Thus, where A and B conspired to defraud C by falsely pretending that parcels sold by them to

State v. Crowley.

him contained counterfeit money, when, in fact, they contained sawdust, *held*, that A and B could not be convicted of a conspiracy to obtain money of C by false pretenses.

INFORMATION against O. Crowley, J. Crowley and one Carnahan, charging them with a criminal conspiracy. The defendants were tried and convicted, but the trial court suspended judgment and reported the case to the Supreme Court for the determination of the following questions of law :

1. Does the first count of the information charge criminal offenses ?

2. Does the evidence support the charge of conspiracy as laid in the said first count?

The first count of the information charged that on a day and at a place named, the defendants "wickedly and unjustly devising and intending one Daniel Burke to defraud and cheat of his money and property, did then and there unlawfully, falsely and fraudulently conspire, combine, confederate and agree together and among themselves, to get and obtain, knowingly and designedly, by false pretenses and by false and privy tokens and subtle means and devices, of him, the said Daniel Burke, one hundred and ten dollars in money, the money and property of him, the said Daniel Burke, of the value of one hundred and ten dollars, with the intent then and there to cheat and defraud him, the said Daniel Burke, of the said money, against the peace," etc.

The testimony at the trial was, in substance, that O. Crowley solicited Burke to pay him fifteen dollars for one hundred and fifty dollars of counterfeit money. Burke agreed, and paid the fifteen dollars. Sometime after Burke received a letter alleged to have been written by the defendant, J. Crowley, acknowledging the receipt of the fifteen dollars, and promising to send "the goods." Afterward Burke received another letter, informing him that the writer (alleged to be the defendant, J. Crowley) had sent by express a parcel "containing \$1,000 of various denominations, with full directions how to pass," etc., and requiring Burke to pay the express agent \$20, and to remit \$65 to the writer. Burke paid the \$20 and got the parcel, but found that it contained only sawdust, etc. He complained to Crowley, who promised to have the "mistake corrected," and a further parcel was sent, on which Burke paid \$25 to the express agent, but which he found to con-

State v. Crowley.

tain only sawdust as before. While the box was in Burke's possession, but before he had opened it, the defendant, Carnahan, a constable, arrested him on the ground that he had in his possession counterfeit money, but agreed to discharge him for fifty dollars, which he paid.

Burke desired to purchase the counterfeit money for the purpose of uttering it as good money.

A. Scott Sloan, attorney-general, and *J. M. Morrow*, district attorney, for the State.

Hall & Skinner, and *Cameron, Losey & Bunn*, for defendants.

LYON, J. 1. It is maintained by the learned counsel for the defendants that the information is fatally defective, in that it fails to show the means which the defendants conspired to employ for the purpose of defrauding Burke of his money. Their position is, that the false pretenses and devices which the defendants conspired to use to that end should be specifically set out in the information.

Were this an information for obtaining the money of Burke by false pretenses, the position would be well taken. For we take it to be well settled, that in such an information the false pretenses resorted to by the accused to perpetrate the fraud must be set out with reasonable particularity, and that an averment thereof in the general language of the statute on that subject (R. S., ch. 165, § 37) is sufficient before verdict. *State v. Green*, 7 Wis. 676.

But there is, undoubtedly, a broad distinction in this respect between an information for obtaining money or property by false pretenses, and one for a conspiracy to do so. In the latter case the averment may be less specific than is required in the former. The distinction is well stated by DEWEY, J., in *Comm. v. Eastman*, 1 Cush. 223, as follows: "If an indictment for murder should allege merely that the accused had committed the crime of murder upon the person of one A B, or if an indictment for larceny should simply set forth that the defendant had stolen from C D, in neither case would the offense be set forth with the particularity and precision required by law. It must be conceded, however, that in indictments for conspiracy a different rule prevails to some extent; and the precise inquiry which we have now to make is, to what extent? The offense of conspiracy, in one respect, is doubtless

peculiar. It may, unlike most offenses, be committed without any overt act. A criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons, may, by such assent and agreement, ripen into crime, although no act be done in pursuance of it.

“The peculiar character of this offense has fully justified, in certain cases of conspiracy, a departure from the ordinary rules of criminal pleading. The means proposed to be used to effect a criminal purpose are not, in all cases, to be set out, and are not, in all cases, required to be proved ; nor are they, in all cases, a necessary element of the crime of conspiracy. To a certain extent, the rules upon the subject are uncontroverted. If the alleged conspiracy be an unlawful agreement of two or more persons to do a criminal act, which is a well-known and recognized offense at common law, so that by reference to it as such, and describing it by the term by which it is familiarly known, the nature of the offense is clearly indicated, in such a case a charge of conspiracy to commit the offense, describing it in general terms, will be proper. On the other hand, if the agreement or combination be to do an act, which is not unlawful in itself, by the use of unlawful means, those means must be particularly set forth, or the indictment will be bad.” This is doubtless a correct statement of the law ; and were the obtaining of property by false pretenses a common-law offense in every case, there would be no doubt of the sufficiency of the information in the present case. But in many cases the obtaining of money or property by such means is not a criminal offense at the common law, but is only so by virtue of the statute. R. S., ch. 165, § 38. The question is, therefore, whether one rule of pleading should be applied to an information charging a conspiracy to do an act criminal at the common law, and another rule to an information charging a conspiracy to do an act made criminal by statute. We are aware that there are decisions which seem to hold that the two cases are governed by different rules, but we are quite unable to find any solid ground upon which to rest the distinction. In either case the information must contain sufficient averments to show that the conspiracy was to do a criminal act and, that appearing, what can it signify that such act is made criminal by statute instead of being so by the common law ? In both cases it would seem that the same rules of pleading should be applied.

An indictable conspiracy is defined to be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. Per SHAW, C. J., in *Comm. v. Hunt*, 4 Metc. 123. There are some qualifications to this definition, but we need not consider them here. It will be found, on examination, that in many of the cases which hold that the means by which the purposes of the conspirators are to be accomplished must be particularly stated in the indictment or information, the conspiracy alleged in each is to accomplish some purpose, not in itself criminal or unlawful, by the use of criminal or unlawful means. In the last case cited (*Comm. v. Hunt*), Chief Justice SHAW said: "When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offense, which is intended to be charged, consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the means of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood, or other criminal or unlawful means, must be set out in the indictment. Such, we think, is, on the whole, the result of the English authorities, although they are not quite uniform. 1 East's P. C. 461; 1 Stark. Crim. Pl. (2d ed.) 156; opinion of SPENCER, Senator, 9 Cow. 586 *et seq.*"

The fair inference from this language is, that where the confederacy consists in an agreement to accomplish a criminal purpose, while the *purpose* must be clearly expressed in the indictment, the specific *means* by which it is proposed to accomplish it need not be averred. And we think this view is sustained by the weight of authority.

This information charges a combination of the defendants to accomplish a criminal purpose, to wit, to defraud Burke of his money by false pretenses, tokens and devices, and such *purpose* is fully and clearly stated in the information. We think the information fulfills the requirement of the Declaration of Rights (Const., art. 1, § 7), in that it states sufficiently "the nature and cause of the accusation" against the defendants; and that it is not essential to set out the specific means by the use of which the alleged conspirators proposed to accomplish their criminal purpose.

This view is supported by the consideration that the conspiracy itself constitutes the offense, although the purpose of it be not affected. Had the defendants met and agreed to obtain one hundred and ten dollars of Burke by means of false pretenses and devices, or by the use of privy and false tokens, and left it to one of their number to execute the conspiracy by employing such pretenses, tokens or devices to that end as he might choose, there is no doubt the offense would have been complete, and that an indictment for a conspiracy to compass a criminal purpose would lie against the defendants, although nothing had been done in execution thereof. Yet in such an indictment it would be impossible to set out the specific means by which the criminal purpose was to be accomplished, for they were never agreed upon. True, no such difficulty would arise where the objects of the conspiracy have been executed ; but we are not aware that the law makes any distinction between executed and unexecuted conspiracies in respect to the averments required in indictments therefor.

The first question submitted by the learned circuit judge must, therefore, be answered in the affirmative.

II. We are now to determine the second question submitted to us, which is as follows : Does the evidence in the case support the charge of conspiracy as contained in the said first count ?

It has already been said that the information charges a conspiracy by the defendants to commit an act made criminal by section 38 of the statute, that is, to obtain the money of Burke, knowingly and designedly, by false pretenses and by false and privy tokens. It seems clear that the defendants cannot lawfully be convicted of the conspiracy charged in the information, unless the evidence establishes the fact that the purpose thereof was a criminal purpose within the statute. The only evidence before us of the alleged conspiracy or its purpose is the acts of defendants in obtaining money from Burke. Hence, if those acts constitute an offense within the provisions of section 38 of the statute, the evidence is sufficient to support the charge of conspiracy as contained in the information ; otherwise not. We are to inquire, therefore, whether the acts of the defendant, as proved on the trial, would support a conviction on an information against them under the statute for obtaining money of Burke by false pretenses.

The fifteen dollars first paid by Burke to the defendant *C. Crowley* was paid on an executory contract between them that the

State v. Crowley.

latter should procure for Burke a quantity of counterfeit money for circulation. There does not seem to be any element of an offense under section 38 in this transaction. It was a mere executory contract of sale, the breach of which is no crime. On the contrary, had the contract been performed, Burke would have been guilty of a criminal offense, to wit, of having in his possession counterfeit money or evidences of debt, knowing the same to be counterfeit, with intent to utter the same as true. And *Crowley* would probably have been guilty of a criminal offense also in having the same commodity in his possession, knowing it to be counterfeit, with intent to utter it as false. R. S., ch. 166, § 5. It were better, therefore, that the executory contract be broken than kept.

The two sums of twenty dollars and twenty-five dollars, paid through the express company, were obtained from Burke on the false pretense that the boxes received by him contained counterfeit money. Had he obtained what he expected, he intended to use it in a criminal manner. The false pretenses, therefore, prevented him from committing such crime.

In the case of the fifty dollars paid to the defendant *Carnahan*, Burke supposed he was bribing *Carnahan* with that money to commit a crime; and had this supposition been true, Burke would have been *particeps criminis* therein. R. S., ch. 167, § 23.

Hence all the money obtained from Burke was paid by him in the furtherance of criminal motives and intentions on his part. The money having been obtained under such circumstances by false pretenses and tokens, is the case within section 38 before cited?

It has been held in New York, where the same statute is in force, that false pretenses of that character are not within the statute, and not punishable criminally. In *McCord v. The People*, 46 N. Y. 470, it is said *per curiam*, that "the prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if, in attempting to do this, he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offense. Neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who

for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who for unworthy or illegal purposes part with their goods."

So also in *The People v. Stetson*, 4 Barb. 151, Mr. Justice WELLES, delivering the opinion of the court, says: "In all the numerous reported cases under English and American statutes to prevent the obtaining money, etc., by false tokens or pretenses, I have not found one which was held to be within the statute, in which the transaction on the part of the person injured would not have been lawful, provided the representations or pretenses were true, nor where such representations or tokens, if true, were not in violation of law. I cannot believe the statute was designed to protect any but innocent persons, nor those who appear to have been in any degree *particeps criminis* with the defendant. To determine what attitude he occupies in that respect, it should be assumed that all the representations made to him, whether in words or in tokens, were true; because it is an essential ingredient of the case that he believed them to be true; otherwise he could not claim that he was influenced by them. Looking at his conduct in that light, and with that assumption, if, in parting with his money property or yielding his signature, he was himself guilty of a crime, it cannot be that he is within the protection of the statute. Testing the case under consideration by these rules, it is impossible, in my opinion, to sustain the indictment. Barlow believed that the defendant was a constable, and had a warrant against him for a rape. He is chargeable with knowledge that the law forbade any settlement or compromise of the matter, and that it would be a misdemeanor in the defendant to neglect to execute the process. In attempting to cheat the law, he has himself been defrauded of his watch."

In *The People v. Clough*, 17 Wend. 351, Mr. Justice COWEN refers to the preamble of the act of 30 Geo. II, ch. 24, of which the statute of New York and our own are substantially copies, as showing the reason and scope of those statutes. It is as follows: "Whereas, divers evil disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats and devices, fraudulently obtained divers sums of money, goods, wares and merchandise, to the great injury of industrious families, and to the manifest prejudice of trade and credit." This preamble goes to

State v. Crowley.

show that the law was originally enacted for the protection of trade and credit, and of honest and industrious people, and not (in the language of *McCord v. The People*) "for the protection of rogues in their dealings with each other."

The doctrine of the above cases was vigorously assailed upon principle by Mr. Justice PECKHAM, dissenting from the decision of the court in *McCord v. The People*, and he cited *Comm. v. Harris*, 22 Penn. St. (10 Harris) 253, and *Comm. v. Morrill*, 8 Cush. 571. It must be conceded that these cases, particularly the former, sustain his views.

Rex v. Stratton, cited in a note to *Buck v. Buck*, 1 Campb. 549, illustrates the same principle, and is directly in point in this case. The indictment was for a conspiracy to deprive the prosecutor of the office of secretary of an illegal company. Lord ELLENBOROUGH said: "This society was certainly illegal. Therefore, to deprive an individual of an office in it cannot be treated as an injury. When the prosecutor was secretary of the society, instead of having an interest which the law would protect, he was guilty of a crime."

In Jacob's Law Dictionary, the essential elements of a criminal conspiracy are thus stated: "CONFEDERACY (*confederatio*). is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And false *Confederacy* between divers persons shall be punished, though nothing be put in execution. But this *Confederacy*, punishable by law before it is executed, ought to have these incidents: First, it must be declared by some matter of prosecution, as by making of bonds, or promises, the one to the other; secondly, it should be malicious, as for unjust revenge; thirdly, *it ought to be false, against an innocent*; and lastly, it is to be out of court, voluntarily. *Terms de Ley*, 158." In the present case, the confederacy or conspiracy charged in the information is punishable by law before it is executed, and hence is within the above rule. As already observed, the proofs show that it is not "*false, against an innocent.*"

After much investigation and deliberation, we have reached the conclusion that the rule of the New York cases is supported by the better reasons, as well as by the weight of authority, and that it is our duty to adopt it. We do so with hesitation, because able judges and courts have held a different rule; and with reluctance, because the acts of the defendants (or some of them), as disclosed

Hart v. Stickney.

by the evidence, were outrageous and indefensible, and the perpetrators richly merit punishment. But it is far better that they should escape punishment under this information, than that sound legal rules should be disregarded to meet the supposed exigencies of a particular case.

It may further be observed (although not essential to the determination of the question under consideration), that had Burke exercised common prudence and caution, he could not have been misled by the false pretenses by which he was induced to pay the money to *Carnahan*. He had in his possession the box which the latter charged contained counterfeit money, and, by an examination of its contents, could readily have ascertained whether the charge was true. The cases cited by counsel for the defendants abundantly show that such a case is not within the statute.

It follows from the foregoing views that the second question submitted by the learned circuit judge for our determination must be answered in the negative.

The case must be certified to the Circuit Court with these answers to the questions reported, and with the direction that that court proceed in accordance with our decision.

It is so ordered.

HART V. STICKNEY.

(41 Wis. 630.)

Promissory note — dishonored by non-payment of interest.

A promissory note, bearing interest payable annually, was indorsed before maturity, but after an installment of interest was due and unpaid. *Held*, that the note was dishonored and that the indorsee took it subject to all equities between the original parties.

ACTION by the plaintiff as indorsee before maturity of a promissory note executed by the defendants May 1, 1873, payable two years from date, with interest payable annually. The defendants denied that plaintiff was an indorsee in good faith and for value before maturity, and set up transactions between themselves and the payee of the note. The defendants had a verdict and judgment, and plaintiff appealed.

Rogers & Hover, for appellant.

Hart v. Stickney.

Jenkins, Elliott & Winkler, for respondents, cited, to the point that the note was dishonored by the non-payment of interest, *Butler v. Wagner*, 35 Wis. 54 ; 2 Parsons on Bills and Notes, 394 ; *Vinton v. King*, 4 Allen, 562 ; 1 Parsons on Bills and Notes, 374 ; *Newell v. Gregg*, 51 Barb. 263 ; *First National Bank v. Scott County Commissioners*, 14 Minn. 77.

COLE, J. The main questions in this case arise upon exceptions taken to the refusal of the Circuit Court to give instructions asked on the part of the plaintiff, and on exceptions to certain portions of the charge. The first question to be considered is, Did the court state the law correctly as to what would amount to a dishonor of the note, so as to subject it to equities existing between the original parties ? Upon that point the Circuit Court in substance held, that where a note is for the payment of money at a specified time, with interest payable annually, and the note is sold by the payee to a third person when a year's interest is past due and unpaid, the law will construe that the note is dishonored — the default in the payment of interest will be sufficient to put the purchaser on his guard to see if there is any thing wrong about the note. The evidence made this charge applicable, if sound as a proposition of law ; for it is an admitted fact that a year's interest had been due on the note for nearly eleven months, when the plaintiff purchased it of the payee. The case most directly in point in support of the view of the Circuit Court, is *Newell v. Gregg*, 51 Barb. 263, to which we were referred on the argument. It is not necessary to state the facts of that case. It suffices to say that the court held that when a note was given for the payment of \$200 two years from date, with interest payable annually, the payment of the interest when due was as much a part of the agreement as the promise to pay the principal ; that it was a portion of the debt which was evidenced by one written promise to pay ; that when the instrument furnishes evidence that the written promise to pay has been broken, a party taking it has notice that the maker may have a defense. The principle of this decision commends itself to the good sense of every one, and we think it is sound. For the fact that interest on the note is due and unpaid is of equally pointed character to show dishonor as the non-payment of an installment. In *Vinton v. King*, 4 Allen, 562, the court decided that a note payable by installments was overdue when the first in-

Hart v Stickney

stallment was overdue and unpaid, and that one who took the note afterward, received it subject to all equities between the original parties. The court say: "The circumstance that a note is overdue makes it incumbent on the party receiving it to satisfy himself that it is a good one; and if he omit so to do, he must stand in the situation of him who was holder at the time it was due." See, also, Parsons on Notes and Bills, 374. We therefore think, upon this branch of the case, that the court was right in charging, upon the admitted facts, that the note was deemed to be dishonored when taken by the plaintiff, and that it was open to the defense set up in the answer. And this view disposes of the exception taken to the refusal of the court to give the second special instruction of the plaintiff, which was to the effect that if he had no knowledge of any defense to the note at the time it was purchased, a recovery could be had upon it. The note in question bore date May 1, 1873, was payable to the order of Thomas W. Hart two years from date, with seven per cent interest, the interest payable annually. The plaintiff purchased the note March 22, 1875, and the first year's interest was then unpaid. On these admitted facts, the plaintiff could not be said to be an innocent purchaser.

[The court then examined the defense interposed, based upon the transactions between the original parties to the note, and held that the instructions to the jury relating thereto were erroneous, and that for this reason the judgment must be reversed.]

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

SMITH v. PHILADELPHIA.

(81 Penn. St. 33.)

Municipal corporation — liability of, for failure of water-works — damages.

A municipal corporation laid water-pipes through the city which any one might connect with his house, and use on payment of a certain water-rent. The pipe with which plaintiff's house was connected was so carelessly laid that it froze and burst, thereby depriving plaintiff's tenants of water, on which ground they abandoned the premises. *Held*, that plaintiff could recover of the city the water-rent paid, while deprived of the use of the water, but not for damages in being deprived of the water, or for loss of tenants.

ACTION on the case, in which the plaintiff alleged and the evidence tended to prove, that he was the owner of certain houses in Silver street, Philadelphia; that he paid the defendant for laying the water-main in that street in front of the houses, and also for permits to introduce the water; that the defendant had negligently laid the main too near the surface of the ground, so that it was frozen during two winters, and there was no water communicated to the houses; the attachments and water-pipes bursted, whereby the plaintiff lost his tenants and the rents of the houses and the benefit of his payment for the main, permits, etc., and expended large sums of money in repairs, etc.

The defendant gave no evidence. The court charged that the plaintiff could not recover for the loss of rents, but only the water-rents paid for the time during which the supply was deficient.

The jury found for the plaintiff for \$128. He took a writ of error, and assigned the instruction of the court for error.

J. W. Hunsicker, for plaintiff in error. A municipal corporation is liable for negligence to the same extent as an individual. *Shearman & Redfield on Negligence*, §§ 120, 137, pp. 139, 163. Such corporation is liable for injury resulting from the improper performance of work which it was its duty to perform. *Mersey Docks v. Peirce*, 11 H. of L. Cas. 686; *West Sav. Fund v. Philadelphia*, 7 Casey, 185; *Baily v. New York*, 3 Hill, 538; *Addison on Torts*, 731; *Lacour v. New York*, 3 Duer, 406; *Pittsburg v. Grier*, 10 Harris, 54; *Pottstown Gas Co. v. Murphy*, 3 Wright, 263.

R. N. Willson (with whom was *C. H. T. Collis*, city solicitor), for defendant in error. It is discretionary with the city whether she will extend facilities for furnishing water, and therefore she is liable only for injuries resulting directly from negligence, but not where the circumstances producing the injury are the same as if the work had not been undertaken. *Wharton on Negligence*, § 264; *Carr v. Northern Liberties*, 11 Casey, 324; *Grant v. Erie*, 19 P. F. Smith, 420; *Atchison v. Challiss*, 9 Kan. 603; *Mills v. Brooklyn*, 32 N. Y. 489. The act of the city was not the proximate cause. *Penna. Railroad v. Kerr*, 12 P. F. Smith, 353.

PER CURIAM. The claim here is not for damages arising from the bursting of the water-pipes laid by the city, but for the loss of the water caused by the bursting of the pipes leading to the plaintiff's houses, from the action of frost. The real claim is for the loss of the water, and this will not implicate the city in any loss beyond the consideration paid for its use, viz., the water-rents, and these were allowed. The introduction of water by the city into private houses is not on the footing of a contract, but of a license which is paid for.

Judgment affirmed.

Hey v. Philadelphia.

HEY v. PHILADELPHIA.

(81 Penn. St. 44.)

Negligence — of city in not guarding a dangerous street — proximate and remote cause.

Plaintiff's horse, while being driven on defendant's road, was frightened by a locomotive on an adjacent railroad, became unmanageable, and fell from the road, along which was no barrier, down a precipice and was killed. The jury found that the city was negligent in not placing barriers along the roadside at the point. *Held*, that the defendant was liable for the damage.*

ACTION on the case by Hey against the City of Philadelphia, to recover damages sustained through the alleged negligence of defendant in not placing a guard or barrier on one of its streets, adjacent to a precipice, whereby plaintiff alleged that his horse was killed.

The following facts were stated by Judge HARE, of the District Court, who tried the case: "The plaintiff was returning to the city from a drive in the East Park. A turn in the road brought him to the margin of the Schuylkill, and in full view of the bridge of the connecting railway. He had the stream on one side, and a high bank of rocks or earth on the other. The road was wide and level, but there was a sharp declivity toward the river, with no guard or protection except a sidewalk raised some six inches above the road. A train was passing over the bridge, and the plaintiff's horse took fright. He got out, took the animal by the head and turned it toward the bank. The horse continuing restive, the plaintiff got on a rock to obtain a better hold, but lost his footing and fell between the fore feet of the horse. The animal, freed from all restraint, turned short round, upset the wagon, sprang across the sidewalk into the river, and was drowned. The plaintiff contended that the city was guilty of negligence in not erecting a guard between the road and the stream, and that the accident was attributable to that cause. The question was left as one of fact to the jury, and the law reserved for the consideration of the court."

* See *Page v. Bucksport*, 18 Am. Rep. 239; S. C., 64 Me. 51; *Baldwin v. Greenwoods Turnpike Co.*, 16 Am. Rep. 83; S. C., 40 Conn. 238; *House v. Town of Fulton*, 9 Am. Rep. 508; S. C., 29 Wis. 296.—REP.

Court submitted the question of negligence to the jury, reserving the following points :

1. Was there any evidence of negligence on the part of the city in the construction of the road?

2. Was there any evidence that the damage to the plaintiff was the result of negligence on the part of the city?

The jury found a verdict for the plaintiff for \$505, subject to the reserved points. The court subsequently entered a verdict for the defendant *non obstante veredicto*.

R. P. White, for plaintiff in error. A traveler has a right to presume that a highway in use is safe, and even if he knows of defect in it, he is only bound to use ordinary care in avoiding the danger. *Shearman & Redfield on Negligence*, 413, 414, and cases cited; *Humphreys v. County of Armstrong*, 6 P. F. Smith, 204. A town bound to provide for the safety of travelers ought particularly to guard against happening of accidents at railroad crossings. *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 500. They are not ordinarily bound to fence roads, but are bound to fence at places otherwise unsafe for travelers exercising ordinary care. *Collis v. Dorchester*, 6 Cush. 396. Whether fence is necessary is a question for the jury. *Booker v. Anderson*, 35 Ill. 66; *Hyatt v. Rondout*, 44 Barb. 385; *Norris v. Litchfield*, 35 N. H. 271; *Macungie Tsp. v. Merkhoffer*, 21 P. F. Smith, 276. This was one of the ordinary incidents and dangers of travel which the city was bound to guard against by every reasonable means in their power. *Scott v. Hunter*, 10 Wright, 194; *Lund v. Tyngsboro'*, 11 Cush. 563; *Pittsburgh v. Grier*, 10 Harris, 54. It was a question of fact for the jury, whether the want of a safeguard was an efficient and concurrent cause of the injury, and there was ample evidence for them to pass upon it. *Allen v. Willard*, 7 P. F. Smith, 378; *Hays v. Gallagher*, 22 id. 136; *McKee v. Bidwell*, 24 id. 218.

R. N. Willson (with whom was *C. H. T. Collis*, city solicitor), for defendant in error. The city claims that she is not bound to put or keep any or all of her highways in a condition which will insure or promote safety to horses which have broken away from, and not under the control of, their drivers, for the reason that the use of a highway by such an uncontrolled animal is not an ordinary, natural and legitimate use. *Davis v. Dudley*, 4 Allen, 557; *Titus*

Hey v. Philadelphia.

v. *Northbridge*, 97 Mass. 258 ; *Fogg v. Nahant*, 98 id. 578 ; *Moulton v. Sanford*, 51 Me. 127 ; *Linton v. Chester*, 1 Weekly Notes, 192.

GORDON, J. The jury found that the city authorities were derelict in duty, in not placing proper guards or barriers along the river side of this very dangerous piece of road, and that this neglect was the proximate cause of the loss complained of by the plaintiff. The court, on the other hand, regarded the fright and breaking away of the horse as the immediate cause of the disaster, and hence entered judgment for the defendant, *non obstante veredicto*. Herein we think the court erred. It is true that ordinarily provision is not to be made against contingencies so rare as runaway horses. Roads and bridges are constructed for the purpose of ordinary travel, and if they fulfill such purposes they are sufficient, and those who have them in care are not chargeable with the results of extraordinary accidents that may occur upon them.

These things must, however, be governed by common reason and observation. A road may be perfectly safe under some circumstances, and very unsafe under others. A way of ten feet in width, in the open country, may be as secure as one of ten times that width, but along the brow of a precipice such a way would be very insecure. Perhaps, indeed, a steady, sure-footed team, handled by a cool and skillful driver, may pass over it as securely as over the former, but drivers of only ordinary nerve, with fractious teams, are unsafe upon it ; and it is just for this reason that such a road should be provided with guards which, under ordinary circumstances, would not be essential. As was said, *per curiam*, in the case of *Lower Macungie Tsp. v. Merkhoffer*, 21 P. F. Smith, 276, "a highway must be kept in such repairs that even *skittish* animals may be employed without risk or danger on it." So we have held that, where a horse frightened and backed off a bridge, the township was responsible for the loss resulting therefrom, because of the neglect of the supervisors in not providing side railings, by which, notwithstanding the fright of the horse, the accident might have been prevented. *Newlin Tsp. v. Davis*, 27 P. F. Smith, 317. Had this accident happened upon an open and unrailed bridge, under circumstances similar to those exhibited by the evidence now under consideration, there could be but one opinion as to the liability of the city. In such case the proximate cause of the disaster would be so obvious that no one could avoid its observance. Given secure

Hey v. Philadelphia.

side guards, and the driver is under no apprehension of immediate danger, whether his horse attempts to run or back ; in either case, he retains his seat and the lines, and has a reasonable chance to save himself and his property ; remove the guards, and he is at once surrounded by circumstances of extreme danger, calculated to appal an ordinary person, and it may, indeed, be the best thing he can do to abandon horse and carriage to their fate, and endeavor, as best he may, to save his own life. Here the circumstances created by the neglect of the public authorities are such as to render the accident not only possible, but probable ; and it is against such probabilities that they are bound to provide ; and the want of such provision is negligence *per se*. There is, however, no reasoning which applies to a bridge that does not also apply to a road, for a bridge is but part of a road. If the road is so dangerous, by reason of its proximity to a precipice, or any other cause, that common prudence requires extra precaution in order to insure the safety of the traveling public, why shall not the authorities be bound to such precaution ?

Now that Hey was surrounded by circumstances calculated to excite alarm in the mind of an ordinary person, no one can well deny ; that the unfenced precipice was a dangerous element, which would naturally beget such alarm, will, no doubt, also be conceded ; and that he did nothing that a man of prudence ought not to have done the jury have found. Where, then, was the fault ? Was it not to be found in this unguarded declivity ? But, it is said, the running away of the horse was the proximate cause of the injury, and, had it not gone over the bank, it might have gone farther with the same result in the end. This, however, does not follow ; nor is it necessary to be conceded, for, ordinarily, a dead horse does not result from a runaway ; and, hence, had there been proper guards at this place, the chances are ten to one the horse, at least, would have been saved. Granting, however, that the runaway was the immediate cause of the whole disaster, still the question remains, What produced the runaway ? In *Pittsburg v. Grier*, 10 Harris, 54, the immediate cause of the sinking of the steamer was the striking of some heavy body floating in the stream, nevertheless, as the *causa causans* was some piles of pig metal, negligently permitted to lie on the public wharf, thus obliging the boat to occupy a position more dangerous than it otherwise would have occupied, the

Hey v. Philadelphia.

city was held liable. A like case is that of *Scott v. Hunter*, 10 Wright, 194, in which *Pittsburg v. Grier* is approved.

Thus we see that the immediate cause of the damage may be but the effect of a precedent cause, and if the latter arises from a neglect of duty chargeable upon a municipality, such municipality is liable therefor.

As, therefore, the jury, in view of all the circumstances of this case, might legitimately find that the losing of the control of his horse, by Hey, resulted from the alarming character of the unfenced precipice, inducing him to jump from his carriage in order to save himself and his children from the threatened danger, we conclude that for this reason, if for none other, the verdict should have been permitted to stand.

We do not regard the cases to which we have been referred by the counsel for the defendant in error as in point. In all of them the immediate cause of the accidents complained of was the running away, or loss of control of the horses, occasioned by accidents unconnected with the condition of the roads over which they were passing. As in the case of *Davis v. Dudley*, 4 Allen, 557, where the bolt connecting the cross-bar and thills with the sleigh broke, and let them fall on the horse's heels, thus frightening it and causing it to run away, and during its flight it broke one of its legs upon a pile of wood lying in the road, it was held that the town was not liable. But if we reverse the case, and suppose the fright of the horse to have been occasioned by some prudent endeavor of the driver to escape the danger of an obstruction in the highway, it is probable the decision would have been different. It is, however, only under the latter statement of the case that it becomes similar to that under consideration; hence, it and its kindred cases have no applicability to the discussion in hand.

The judgment of the District Court is now reversed, and a judgment for the plaintiff below is entered on the verdict, and the record is directed to be remitted to the court now having jurisdiction of the records of said District Court for execution.

AGNEW, C. J., and PAXSON, J., dissented.

PHILADELPHIA V. SCOTT.

(81 Penn. St. 80.)

Constitutional law — due process of law — eminent domain.

A statute required the owners of an embankment bordering a river to repair the same, when notified by the proper authorities so to do; and provided that, in case of their failure to repair, the authorities should repair; that the expense thereof should be a lien on the land, and that, in an action to enforce such lien, no plea but payment should be allowed. *Held* unconstitutional, there being no judicial method of determining the necessity of the repairs.

ACTION to recover money alleged to be due under the statute quoted in the opinion. The claim was for work and services in repairing an embankment along the Delaware river, owned by defendant, under the statute which required the owners of such embankment to repair them on a notice so to do from the commissioners of highways, or on default, authorized such commissioners to make the repairs, and created the charge therefor a lien on the land. All the facts necessary to a recovery under the statute were proved and a verdict was rendered for the plaintiff, but the judge *non obstante veredicto* ordered judgment for the defendant.

Chief Justice AGNEW, in delivering the judgment of the Supreme Court, discussed at length the validity of a statute requiring the owners of land adjacent to water to build and keep in repair embankments to prevent the overflow of water, expressing his conclusion, so far as it related to this case, as follows: "But where the State has banked out the water, and the owner is left in possession of the improvement made by the State, under her sovereign authority and at her own expense, it seems to me he stands in a new and different relation. The State having, by her own authority, taken the land between high and low-water lines out of the public use, has, in effect, appropriated it to the use of the owner of the qualified title, and in effect conferred upon him an absolute title. She has thus benefited him, and it is but just that the duty of repair should now devolve upon him. To this extent we may, I think, conclude that the act of March 25, 1848, under which this proceeding took place, is constitutional. Pamph.

Philadelphia v. Scott.

L. 1848, p. 250. Its title is fairly descriptive of its true purpose, though the act having been passed before the constitutional amendment of 1864, the title has not the same force in interpretation it would have since. It is entitled, "An act to provide for the repairs of the meadow banks upon the Delaware front, in the county of Philadelphia, above the city of Philadelphia," etc. The purpose of the act was to compel repairs of existing meadow-banks, not to construct them.

S. S. Hollingsworth and *G. W. Biddle*, for plaintiff in error.

D. W. Sellers, for defendant in error.

AGNEW, C. J. The only question, therefore, remaining is, whether the act has furnished a constitutional mode of proceeding, to bind the owner of the land to the payment of the expense of the repairs. The following are all its material provisions: "It shall be the duty of the commissioners * * * upon complaint by any person owning property fronting upon such river, or liable to be damaged by the overflow of the same, that said banks, or any part thereof, are out of repair, or in an unsafe or insecure condition, to give notice forthwith to the owner or owners of such part or portion to repair the same within forty-eight hours after such notice, * * * and in case such owner or owners shall neglect or refuse to cause such repairs to be made within the time aforesaid * * * it shall be the duty of such commissioners to cause the said banks to be well and thoroughly repaired, etc., and they shall enter the same as lien against the said premises and the owners thereof." The law then provides for a *scire facias* to enforce payment, and declares "that upon the trial of such action the said defendant shall only be permitted to aver and prove in defense that the lien, in whole or in part, has been paid since the same was filed, and that all matters necessary for a recovery on part of the plaintiffs shall be considered as proved by the production of the lien and *scire facias* thereon at the time of trial.

The law, it will be seen, provides no mode of determining the necessity for repair, not even the judgment of the commissioners, for they are bound on complaint, *forthwith* to give notice, and the owner is bound, *within forty-eight hours after notice*, to make the repairs, and on default the commissioners shall do the work at his expense. Whether the bank actually needs repair, or the injury

complained of, if any, is a total destruction of the bank, demanding reconstruction, or a mere repair, which the owner is bound to do, is not to be ascertained before the liability is settled upon him. He is to pay at all events, and this case itself is evidence of the necessity of the provision to determine the nature of the thing complained of, for we have a finding of \$6,445.66 against the defendant, a sum which looks more like the price of reconstruction than of repair. Repair is all this law provides for. Perhaps some allowance might be made, and the clause requiring the commissioners "to cause the banks to be well and thoroughly repaired," might be interpreted as inferentially requiring an examination and decision upon the duty of repairing before they proceeded to do it. But we are met by the proviso, which forbids any defense but payment. There can be no inquiry into the fact whether the commissioners actually did determine it to be a case of necessary repair, whilst *they* may have gone on different grounds. An act which subjects a man to a penalty of over six thousand dollars for not doing the work for which complaint was lodged, should clearly devolve the duty of decision upon some impartial tribunal. The case of *Kennedy v. The Board of Health*, 2 Barr. 366, is not in point. There the 27th section of the act of 29th of January, 1818, grounds the right of the board to abate the nuisance in express words in the *opinion* of the *board* that the nuisance tends to endanger the health of the citizens. This is an essential pre-requisite, and the citizen is absolutely entitled to the judgment of the board on this point. This feature is at the foundation of the decision. In that case the constitutional question was not raised. But here the learned judge was of opinion that the act of 1848 does not furnish due process of law, within the protection of the 9th section of the Declaration of Rights, that no one shall be "deprived of his life, liberty or property unless by the judgment of his peers or the law of the land." In this view we concur. What is meant by the law of the land has been fully discussed in *Craig v. Kline*, 15 P. F. Smith, 413, and the cited authorities. I shall not enlarge upon it. Suffice it to say, the law must furnish some just form or mode, in which the duty of the citizen shall be determined before he can be visited with a penalty for non-performance of the alleged duty. The proceeding must be in its nature judicial, though it is not necessary it should be before one of the ordinary judicial tribunals of the State.

Judgment affirmed.

Reserve Mutual Insurance Company v. Kane.

RESERVE MUTUAL INSURANCE COMPANY v. KANE.

(81 Penn. St. 154.)

Life insurance — insurable interest.

A son has an insurable interest in the life of his father; especially where the son is liable under the poor law for the support of the father.*

ACTION on a policy of insurance issued by the defendant on the life of John Kane, upon the petition of and payable to James Kane, the plaintiff, who was a son of John Kane. The plaintiff's evidence proved the death of John Kane; that the plaintiff had paid the father's passage money from Ireland; that the father was a laborer, and died without leaving any property.

The defendants' points were:

1. If the jury find from the evidence that the plaintiff was, at the execution of the policy of life insurance, an adult son of John Kane, then as such he had no insurable interest in the father's life, and the verdict should be for the defendants.

2. If the jury find from the evidence that the plaintiff represented, at the time of his application, that he had an insurable interest in the life of John Kane, it is now incumbent upon him to satisfy the jury that he had such an interest, and if he has failed so to do, the verdict should be for the defendants.

3. Plaintiff, as a creditor, can only recover in this case the amount of his outlay on behalf of his father.

The court refused the points, and directed the jury to render a verdict in favor of the plaintiff for the amount of said policy, \$2,000, less six months' premium unpaid, and for the interest, amounting to \$2,085.34. The jury so found.

The defendants took a writ of error, and assigned the refusal of their points and the instruction of the court, for error.

H. M. Dechert, for plaintiffs in error, as to first assignment, cited *Dalby v. India Life Assurance Co.*, 15 C. B. 365; *Shilling v. Accidental Death Insurance Co.*, 2 H. & N. 42; *Ruse v. Mutual Life Insurance Co.*, 23 N. Y. 516; *Lord v. Dall*, 12 Mass. 115; 3 Kent's Com. 268; *Halford v. Kymer*, 10 B. & C. 724; *Bunyon*, 16;

*See *contra*, *The Guardian Mutual Life Insurance Company v. Hogan*, *ante*, p. 180.

Reserve Mutual Insurance Company v. Kane.

Dowderwell on Life Insurance, 19; *Shilling v. Accidental Death Insurance Co.*, 27 L. J. Exch. 16; *Miller v. Insurance Co.*, 2 E. D. Smith, 268; *Mitchell v. Union Life Insurance Co.*, 45 Me. 104; *Franklin Life Insurance Co. v. Hazzard*, 41 Ind. 116; *Loomis v. Insurance Co.*, 6 Gray, 396; *Stevens v. Warren*, 101 Mass. 564; *American Insurance Co. v. Robertshaw*, 2 Casey, 189; *Bevin v. Connecticut Mutual Life Insurance Co.*, 23 Conn. 244; *Cammack v. Lewis*, 15 Wall. 643; *Fox v. Penn Mutual Life Insurance Co.*, 4 Bigelow's Life R. 485; *Pritchett v. Insurance Company of North America*, 3 Yeates, 458; *Craig v. Murgatroyd*, 4 id. 168; *Adams v. Pennsylvania Insurance Co.*, 1 Rawle, 106; *Delaware Insurance Co. v. Archer*, 3 id. 223; *Ellmaker v. Franklin Fire Insurance Co.*, 6 W. & S. 439; *Edgell v. McLaughlin*, 6 Whart. 176.

If the interest relied upon be that of a creditor, then the policy must be reasonably proportioned to the amount of the indebtedness, and will not be good beyond that amount. *American Life Insurance Co. v. Robertshaw*; *Fox v. Penn Mutual Life Insurance Co.*, *supra*.

D. C. Harrington, for defendant in error. Parents and children have insurable interests in each other's lives. *Loomis v. Eagle Life Ins. Co.*, 6 Gray, 396. So, sister and brother. *Lord v. Dall*, 12 Mass. 115; *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Trenton Mutual Life & Fire Ins. Co. v. Johnson*, 4 Zab. 576; *Bunyon*, 23; *Barker v. Morris*, 1 Moo. & R. 66; *Bevin v. Conn. Mutual Life Ins. Co.*, 23 Conn. 251.

PER CURIAM. By the 28th section of the Poor Law of June 13th, 1876, the father and grandfather, and the mother and grandmother, and the children and grandchildren of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is, therefore, a legal liability. When we add to this the feelings of natural affection and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his life-time, and thus both father and mother be cast

Mount Moriah Cemetery Association v. Commonwealth.

upon the son; or, if the father die before her, the necessity may fall at once upon the son. Why, then, should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time. We are of opinion that the policy is not void.

Judgment affirmed.

MOUNT MORIAH CEMETERY ASSOCIATION v. COMMONWEALTH.

(81 Penn. St. 235.)

Cemetery — restricting right of burial — mandamus.

After one has purchased a lot in a cemetery, the managers thereof have no power to abridge his right of sepulture by any unreasonable limitations thereon.

A by-law of a cemetery association prohibiting the burial of negroes therein is void as to persons who were lot-owners when the by-law was passed. The managers of a cemetery may be compelled by mandamus to permit the burial of persons entitled to sepulture therein.

MANDAMUS by the Commonwealth on the relation of W. Boileau and Margaret Jones against the Mount Moriah Cemetery Association, an association incorporated under the law of a State—and authorized to make by-laws, etc., and to sell lots in fee, simple or otherwise, for sepulture alone, under such rules as the managers might ordain for the burial of the dead. The by-laws provided that there should be no burial without a written permit from the secretary, and that all transfers of lots must be registered in the office of the association. Boileau bought a lot and his deed was registered; he conveyed it to Jones, a colored woman; this deed was not registered. She applied for a permit to bury her husband; the secretary declined, because the lot was registered as Boileau's. Boileau asked for a permit to her to bury her husband in the lot; the managers then directed the secretary to refuse an approval of the transfer to Jones. The secretary refused to issue a permit for the burial. An alternative mandamus was issued, and the defendants answered. The Commonwealth demurred.

Mount Moriah Cemetery Association v. Commonwealth.

In the Court of Common Pleas, LUDLOW, P. J., delivered the following opinion:

* * * “The relators have, or one of them, by the act of the defendants, a fee simple in the lot. Undoubtedly the ground thus held can only be used for the purpose of sepulture, and this right, if it exists in either of the relators, is absolute. A body is brought to the grave for burial: how can a remedy be provided except by mandamus, if then and there the corporation refuse to permit the body to be deposited? This cause is not like the mere disturbance or obstruction of an easement for which damages may be recovered, as in the case of a pew-owner, who has generally a limited usufructuary right only, and who may recover damages for its destruction or loss; nor is it analogous to the class of cases in which equity would decree the specific performance of a contract, because a remedy must be speedily applied. The very function of the writ of mandamus is to set in motion and compel action, and any existing remedy relied upon as a bar to interference by mandamus, must not only be an adequate remedy in the general sense of the term, but it must be specific, and appropriate to the particular circumstances of the case. High on Ex. Legal Remedies, 12–19. Being of the opinion that no legal remedy can be applied in cases of this kind except by the exercise of extraordinary power, I proceed to consider the other propositions of law involved in this case.

“The charter of this corporation is the law of its being, and that charter must be strictly construed. * * *

“Unquestionably, in my judgment, any transfer without the approval of the managers was in direct violation of the organic law of the corporation, and vested no title in Mrs. Jones — the corporation being the paramount owners of the soil, conveyed to Boileau ‘subject to the articles of incorporation under the rules and regulations’ of the company. As the undisputed owners they undoubtedly could incorporate any covenant in their conveyance not prohibited by public policy, and the article of the charter, which prohibits a transfer to any person without the approval of the managers, is a covenant binding upon the grantee in the deed.

“Even if I am mistaken in my view of the law upon this point, the question of title in Mrs. Jones is at least doubtful, and if the case ended here, I should, without hesitation, refuse this writ. There is, however, another relator, and his rights are now to be considered in the final disposition of the cause.

 Mount Moriah Cemetery Association v. Commonwealth.

“It is admitted that Boileau is an owner in fee, ‘subject to the conditions of the act of incorporation under the rules and regulations adopted by the managers of the cemetery, of the lot specified in the pleadings. Upon the 27th day of September, 1875, he indorsed upon a letter written by the superintendent to Mrs. Jones, the following :

* * * * *

(Judge LUDLOW here quoted Boileau’s indorsement and the secretary’s reply.)

“The sixth by-law declares, among other things, ‘that no interment shall take place without a written permit from the secretary.’

“Undoubtedly the by-law is a reasonable and legal one, and ought, in a proper case, to be enforced, but under it, can the owner in fee simple be refused the exercise of any right which is incident to an absolute ownership ?

“The answer of this question depends upon the nature of the right claimed, the time when, and manner in which, it is proposed to exercise it, under the very terms of the charter and by-laws of the corporation. It is not contended here that any objection can be made to the manner in which it was proposed to bury Henry Jones, nor to the time when it was intended to inter his body.

“The only question then remaining is, what was the nature of the right by virtue of which the relator, Boileau, claimed to act ? Untrammelled by charter or by-law, it is clear that Boileau might bury whomsoever he saw fit in his own lot.

“Under the charter, by section 4, the ordinary rights of an owner were only so far restrained as to limit the use of the lot to the ‘sepulture of individuals, societies or congregations, without distinction or regard as to sect.’ There is here clearly no distinction in terms as to nationality or color, and the word ‘sect’ necessarily includes any number of individuals who compose the members of a congregation or society, united in some settled tenets, or who follow the teachings of a certain leader. It would seem, therefore, that, while individuals may be buried by the owner in fee simple of a lot, in said lot, without distinction of nationality or color, no objection can be made because any individual is a member of a society or congregation, commonly called a ‘sect.’

“But it may be contended that, by virtue of some section of the charter and by-laws, ‘some condition, rule or regulation’ may limit the exercise of a right which belongs to every owner in fee of the

 Mount Moriah Cemetery Association v. Commonwealth.

County Commissioners, 8 Casey, 223 ; Tapping on Mandamus, 64 ; *Arberry v. Beavers*, 4 Texas, 464 ; *Kentucky v. Denison*, 24 How. 66 ; Green's Ultra Vires, 45 ; High on Mandamus, 204, 207. It will compel the rector, etc., of a parish to do every act requisite for the burial in a churchyard of the corpse of a parishioner. Tapping on Mandamus, 109. No vote or act can enlarge the chartered authority of a corporation. *Salem v. Ropes*, 6 Pick. 23. Discretionary powers must not be arbitrarily exerted. Tapping on Mandamus, 67, 69 ; Green's Ultra Vires, 28, 577.

GORDON, J. Beyond the merely technical objection urged against the decree of the court below, and which we regard as properly disposed of in the opinion of his honor Judge LUDLOW, there is nothing whatever of merit in the defendants' case.

When Boileau purchased the lot in question there was no restriction on his right of sepulture, and the managers of this company had no power afterward to abridge such right by any unreasonable limitation thereon.

The right of interment was refused solely on the ground that the body was that of a colored man. The reason which induced this refusal, as well as the resolution of June 30th, 1875, may be found in a petition presented by certain of the lot-owners to the president and board of managers of the cemetery company, which we give in *extenso* :—

“ We, the undersigned, owners of lots in Mount Moriah Cemetery, having learned that a person of color has purchased from Mr. William H. Boileau a lot in said cemetery, for the purpose of interment, and demands a requisite transfer of the same from the association, do hereby protest against the same, and request that your approval of such transfer be withheld. We are led to make this request by a knowledge of the prejudice which will be aroused against the cemetery if the precedent of the transfer were established, and the consequent depreciation of value of property in this cemetery that would certainly result from such prejudice.”

From this it would appear that the officers of the defendant company were moved by a fear of loss which might result to the treasury of the corporation. But as Boileau has some rights in the premises, which are not forfeitable to the pecuniary interests of the stockholders, we are bound to turn a deaf ear to this reason, which appears so sound and obvious to these petitioners. It is

Mount Moriah Cemetery Association v. Commonwealth.

said, however, that this was but a reasonable exercise of the discretion of the managers, in view of the general prejudice existing against the colored race.

In a sound code of ethics this prejudice never had a respectable standing, for it was but the child of an abnormal servile system that was entitled to no man's respect outside of the country and laws which maintained it. But at this time, when this prejudice is under the ban of recent constitutional and legal provisions, expressly designed for its suppression and extinction, it is scarcely to be expected that we can be induced to indorse its respectability, or to encourage it to linger longer around the halls of justice.

Were we to sustain the case of the defendant, we should be carried far beyond the limits of *The Railroad v. Miles*, 5 P. F. Smith, 209. That case did no more than sustain the power of common carriers to make and enforce such rules and regulations as they might deem just and reasonable with reference to the conveyance of passengers in their own vehicles; whilst we, in the suit in hand, are required, in view of this alleged prejudice, to forfeit the absolute vested rights of a citizen which he holds and claims to exercise under and by virtue of the deed, duly and solemnly executed, of this very defendant corporation.

Now, as *The Railroad v. Miles*, though seemingly just and reasonable, was not in consonance with the will of the people as manifested by the legislative act of March 22d, 1867, it is not apparent—should we reverse the judgment of the court below—that we would have even the support of such a broken reed as popular prejudice.

Judgment affirmed.

WOODWARD, J. I concur in this judgment, on the ground that the regulation established by the company on the 30th of June, 1875, could not affect rights vested by the deed previously executed to Mr. Boileau.

SHARSWOOD, J. I dissent from this judgment and opinion.

KREITER V. BOMBERGER.

(83 Penn. St. 59.)

Vendor and purchaser — deficiency in land sold — where action lies to recover for.

Where a contract for the sale of land is fully executed and the purchase-money paid, the vendee cannot recover for a deficiency in the quantity of land without proof of fraud or of mutual mistake. While the deficiency, if great, is evidence of fraud, it is not conclusive.*

ACTION of assumpsit to recover contribution for money paid by the plaintiff, Kreiter, on a promissory note, on which both plaintiff and defendant were sureties.

The defense was by way of set-off, that Kreiter had sold Bomberger a piece of ground in Warwick village, containing, as represented by Kreiter in the deed, 242 feet 4 inches front, and in depth 200 feet, containing one acre and a half, more or less, which upon actual measurement contained 52 feet 8 inches less in front, the deficiency extending through its entire length, reducing the area to less than an acre, for which he paid \$6,000, and claimed damages for the deficiency. It was a sale consummated by payment, delivery of deed, and possession of the vendee under it.

The jury allowed the set-off of damages for deficiency of land, reducing the verdict from \$676.24, as it would have been upon the first finding, to \$215.59, for which amount they gave a verdict for the plaintiff. The plaintiff took this writ of error.

The error assigned to the ruling of the court below was to the admission of the evidence of the sale of the lot and its deficiency of area, and the instruction of the court thereupon, that if the jury should find the difference between the *represented* and *real quantity very great*, so great as to be a fraud upon the defendant, they should ascertain what damage the defendant sustained by reason of such deficiency and allow as a set-off such sum as they found such damage amounted to. There was no other evidence of fraud than such as might be inferred from the extent of the deficiency.

D. McMullen, for plaintiff in error. Where lands are described by courses and distances, and also by adjoiners, the latter, where

* See *Hoback v. Kilgore*, 21 Am. Rep. 317; *Triplett v. Allen*, id. 320.

Kreiter v. Bomberger.

there is a discrepancy, govern. *Cox v. Couch*, 8 Barr, 147; *Petts v. Gaw*, 3 Harris, 222; *Brolaskey v. McClain*, 11 P. F. Smith, 163.

William R. Wilson, for defendant in error. The evidence under the first error was clearly admissible to contradict the plaintiff's testimony, tending to prove in effect that at that time the drawer had been insolvent. Neither vendor nor vendee having been in possession of so much of the lot as was lacking, this was a constructive eviction *pro tanto*. Rawle on Covenants, 157; *Marston v. Hobbs*, 2 Mass. 433; *Wilson v. Cochran*, 10 Wright, 229. It is matter of set-off. *Hunt v. Gilmore*, 9 P. F. Smith, 450. Rule as to discrepancy applies whether contract is executed or executory. *Coughenour's Adm'rs v. Stauff*, 27 id. 195. *More or less*. 1 Sugden on Vendors, notes to p. 490; *Smith v. Fly*, 24 Texas, 345; 4 Kent, 467. Equity will relieve in case of gross mistake as to quantity.

SHARSWOOD, J. [After deciding an unimportant question.] The remaining assignments relate to the admission of the evidence of set-off, claimed by the defendant, and the instruction of the court to the jury upon that subject.

The right of a vendee to be allowed to recover for an alleged deficiency in the quantity of land purchased by him, as described in his deed or articles of agreement, may arise in three different classes of cases.

The first is when the agreement is entirely executory. I cannot find in our books any case in point, but in most of those which have been decided where the agreement has been carried out by a conveyance, and the giving of securities for the purchase-money, so much stress is laid upon the execution of the deed as to produce the impression that a vendee, where the articles are entirely executory, would be allowed for any considerable falling off in the quantity. Chief Justice TILGHMAN declined to express any opinion upon the question in *Smith v. Evans*, 6 Binn. 102. As the action to recover the purchase-money may be regarded as equivalent to a bill in equity to enforce the specific performance of the contract, it may well be concluded that the vendee ought not to be compelled to pay for more land than he actually receives, unless it appears that he understood and meant to take the risk that the quantity was as represented. The case is much plainer when the agreement is at the price of so much per acre; and even where it

is for a round sum, and the quantity is qualified by the words "more or less," the deficiency should be a reasonable one, as in the old case of *Day v. Finn*, Owen, 133, cited in 9 Vin. Abr. 343, pl. 10, where it is held that *sive plus sive minus* shall be intended of a reasonable quantity. Certainly very much ought to depend upon the extent of the purchase and the value of the land. This, however, is not the case which we have before us, and we do not intend to express an opinion upon it.

The second class of cases is, however, the more usual one: namely, where the contract has been carried out by the execution of a deed and of bonds or other securities for the purchase-money. The question has there arisen upon actions to recover on these securities. In such cases the law is well settled, that where the contract was for a round sum, or even by the acre, the vendee will not be allowed for a deficiency in the quantity, where the number of acres in the deed is stated with the qualification *more or less*, unless there be fraud, or, as is said, the difference is so very great as to show an evident mistake. The rule was stated by Mr Justice SERGEANT, in *Galbraith v. Galbraith*, 6 Watts, 112, in these words: "An examination of the numerous decided cases in our own reports will, I think, show that in the common case between vendor and vendee, in a conveyance of a tract of land bounded by adjoining owners, and described as containing so many acres, *be the same more or less*, at a certain price per acre, where there is no stipulation for admeasurement, nor any *mala fides* proved, redress cannot, after the bargain is closed, be given to either party for a surplus or deficiency subsequently appearing." This rule was adopted and confirmed in *Hershey v. Keemborts*, 6 Barr, 128; Chief Justice GIBSON adding: "The vendor is answerable in respect of the quantity only for *mala fides*." There are indeed many dicta that the difference in the quantity may be so great as to be evidence itself of fraud or deceit, or of great misapprehension between the parties, and then equity will relieve. Though no case is to be found of an actual application of this doctrine in favor of the vendee, or to show what must be the extent of the difference to raise the presumption, yet perhaps it may be fairly conceded, that in an action to enforce the payment of purchase-money, a deduction under such circumstances will be allowed. Such is the weight of extra-judicial opinions. *Boar v. McCormick*, 1 S. & R. 166; *Glen v. Glen*, 4 id.

Kreiter v. Bomberger.

488; *Bailey v. Snyder*, 13 id. 160; *McDowell v. Cooper*, 14 id. 296; *Ashcom v. Smith*, 2 Penn. 219; *Frederick v. Campbell*, 13 S. & R. 136; *Haggerty v. Fagan*, 2 Penn. 533; *Coughenour's Adm'rs v. Stauff*, 27 P. F. Smith, 191.

The third class of cases to which the one now under consideration belongs, is where the contract is fully executed and the purchase-money paid. We are of the opinion that in this class the transaction cannot be ripped up, without actual proof of fraud or mutual mistake. Upon this question the greatness of the difference may be evidence, but not sufficient of itself. There must be other circumstances. Cases of this class very rarely arise. I can find but one instance in our books. That is the case of *Large v. Pennsylvania*, 6 S. & R. 488. There the difference was very great in reference to the extent of the premises. The quantity conveyed was described as $2\frac{1}{2}$ acres, and without the words "more or less;" the actual quantity was, 1 acre, 148 perches. Yet the vendee was denied relief; Chief Justice TILGHMAN remarking: "It is the boundaries to which the grantee must look; he has a right to all the land within them. The quantity is matter of calculation, and, be it more or less, passes. There is no express covenant that the quantity in this case shall amount to $2\frac{1}{2}$ acres. Nor is there any implied covenant, because the quantity is introduced not by way of covenant, but of description." So in *Smith v. Evans*, 6 Binn. 102, which was a proceeding on a mortgage, to recover unpaid purchase-money, whereupon a conveyance of $991\frac{1}{2}$ acres, more or less, the quantity fell short 88 acres, 48 perches, and the vendee was refused relief; Mr. Justice YEATES, in his dissenting opinion, says: "And yet I freely confess that if, under this state of facts, the whole money had been paid, and the transaction closed, I know of no legal mode whereby any of the money could be recovered back." This distinction between cases where the purchase-money has been fully paid and the demand is to recover back part, and cases where the vendor is proceeding upon his securities to enforce full payment, is well sustained by the general principles upon which courts of equity proceed. They will not rescind a contract fully executed without clear proof of fraud or mutual mistake in an essential point. They proceed upon different principles in the enforcement of contracts.

It follows that there was error committed by the learned judge below in admitting and submitting to the jury the deed from

Miller's Estate.

Kreiter to Bomberger. as in itself sufficient evidence of fraud or mistake, if they should think the difference very great. If it was sufficient of itself, it was a question of law for the court and not of fact for the jury. There was no evidence besides the deed to show fraud in Kreiter or mutual mistake of the parties. The vendee was well acquainted with the lot, within the boundaries described in the deed. That was the lot he bought. There was no representation by the vendor of the quantity of acres it contained. The description in the deed was most probably copied from the prior conveyances to him recited in it. Both parties made and concluded the bargain with their eyes open. The vendee threw out no anchor to windward as to quantity as he did as to title by his covenant of general warranty. If within any period short of six years from the time of the transaction, a contract of purchase and sale, fully executed by delivery of the deed and payment of the purchase-money, can be overhauled and materially changed, very disastrous consequences will ensue, not only to vendors called upon to refund what they had every reason to believe was their own and had a right to deal with accordingly, but to the public at large, by sowing the seeds of an abundant crop of lawsuits.

Judgment reversed and venire facias de novo awarded.

MILLER'S ESTATE.

(28 Penn. St. 112.)

Dividend — on insolvent's estate — how made.

A, the maker, and B, the indorser, of a promissory note, made assignments for the benefit of their respective creditors. Each estate paid a dividend. *Held*, that the holder of the note was entitled to a dividend upon the whole amount of the note from each estate.

A PPEAL from a decree of the court below confirming the report of the auditor appointed to audit the account of the assignee for the benefit of creditors of Amos Miller. The facts of the case appear in the opinion of the court.

John Hays, for appellants.

Miller's Estate.

WOODWARD, J. Amos Miller made a voluntary assignment for the benefit of creditors on the 24th of October, 1873. On distribution by an auditor of the balance in the hands of the assignee, Bair and Shenk, the appellants, presented a claim founded on a note for \$3,000, drawn by John Miller, and indorsed by Amos Miller, which had become due and been protested for non-payment on the 1st of April, 1873. It appeared that after making the note, and before the assignment of Amos Miller was executed, an assignment for the benefit of his creditors had been made by John Miller. It appeared also that in a distribution of John Miller's estate, the appellants had received a dividend on their claim of \$399.60. The question presented was, whether the appellants were entitled to a dividend out of Amos Miller's estate on the entire claim, embracing the principal and interest of the note, or on the balance remaining after deducting the dividend received from the assigned estate of John Miller. The auditor allowed a dividend only on the balance, and his report was confirmed by the Common Pleas.

In deciding the question, the auditor and the court below rested on the authority of *The Bank of Pennsylvania v. McCalmont*, 4 Rawle, 307; and *Perit v. Pittfield*, 5 id. 166. In the first of these cases it was held that the rule for making a dividend where more than one of the persons liable to the payment of a note or bill have failed, and made voluntary assignments of their property for the purpose of paying their respective debts and liabilities, is to take the amount actually due upon the bill or note at the times, respectively, at which the first dividend is declared of each fund so assigned. The rule thus established was confessedly outside of any precedent, and was founded on what was assumed to be local practice. Judge KENNEDY said: "The rule possibly has been derived from that which seems to have been adopted in England in cases of bankruptcy, which is to take the amount of the debt actually due at the time of the creditor's first *proving* it against the fund. The only difference between the two cases seems to be that in the case of bankruptcy the amount of the debt due at the time of the creditors first proving it, is taken as the sum for which a dividend shall be allowed, but in the cases of voluntary assignments here, the amount due at the time of declaring the first dividend of each fund, respectively, is taken as the sum on which the dividend is to be allowed. I do not see any sufficient reason why this rule, which has already been adopted in practice here, should

not also be adopted by the courts." In *Perit v. Pittfield*, the principle of *The Bank of Pennsylvania v. McCalmont* was followed without discussion.

In later cases, doctrines have been settled entirely inconsistent with the principle of these two precedents. *Morris v. Olwine*, 10 Harris, 441, decided that a creditor by bond and notes secured by mortgage may have recourse, in the first instance, to the personal property of the debtor, which had been assigned for the benefit of creditors without preference; and that, though after an award by an auditor in his favor to a *pro rata* share of the personal estate, such a creditor, by direction of the court, proceeded upon the mortgage and recovered the greater proportion of his claims, he was still entitled to the *pro rata* dividend on his whole claim, and was not limited to a *pro rata* share on his claim as reduced. A creditor who has a lien upon a particular portion of an assigned estate, and out of a sale of part of which he realizes a portion of his claim, is entitled to his *pro rata* dividend on the whole claim out of the general assets in the hands of the assignee to an amount sufficient to pay the balance of his demand in full, although a portion of the estate on which he holds the lien remains unsold. *Keim's Appeal*, 3 Casey, 42. A debtor executed a general assignment of all his estate in trust for the benefit of his creditors; subsequently, the assignor became entitled to a legacy, which was attached and recovered by one of the creditors for whose benefit the assignment was made. It was held that such creditor was, nevertheless, entitled to a dividend out of the assigned estate, on the whole amount of his claim at the time of the execution of the assignment. *Miller's Appeal*, 11 Casey, 481. It was said in that case, that "a creditor is entitled to a dividend under an assignment, not merely as a creditor, but as an equitable owner of the assigned estate; and the extent of his ownership is fixed by the amount of the claim when the assignment is made."

Patten's Appeal, 9 Wright, 151, was perhaps a still stronger case. In the argument, the authority of *The Bank of Pennsylvania v. McCalmont*, 4 Rawle, 307, and *Perit v. Pittfield*, 5 id. 166, was there pressed upon the court in opposition to the doctrine announced in *Miller's Appeal*. It was ruled that the detention by vendors of goods sold on the insolvency and assignment for the benefit of creditors by the vendees, did not rescind the contract of sale; that the vendors were entitled to *pro rata* distribution out of the

Miller's Estate.

assigned estate; and that where part of the goods had been delivered, and the balance, which had been retained, had been sold by the vendors, who applied the proceeds to the payment of the notes given upon the sale, leaving a balance still due, they were entitled to a dividend on the whole amount of their claim at the date of the assignment. In delivering the opinion, Judge STRONG said: "If the beneficial ownership of property assigned in trust for creditors is not in the creditors for whose benefit the trust was made, it can be nowhere, for clearly it is not in the assignor, nor is it in the trustee; surely it cannot be maintained that when an assignment has been made in trust for creditors, it does not operate as much for the benefit of a creditor who holds a collateral security for the debt due him as for the benefit of the creditor who holds no collateral." These cases have been emphatically indorsed by this court in *Hess's Estate*, 19 P. F. Smith, 272; *Brough's Estate*, 21 id. 460; and *Graeff's Appeal*, 29 id. 146. *Brough's Estate*, indeed, may be regarded as decisive. Brough being indebted to Hinchman, gave him his own note with indorsers, and the note of Gabley as collateral security. Brough afterward assigned for the benefit of creditors. The notes were not paid at maturity, but afterward payments on account were made by the indorsers. In the distribution of Brough's estate, it was held that Hinchman was entitled to a dividend on the amount due at the date of the assignment, irrespective of the intervening payments.

Upon authority the rights of the appellants would seem clear. They would seem clear also in view of a principle so simple and palpable as to be obvious to the plainest comprehension. If the estates of the two debtors had been adequate to the purpose, the appellants had the right to demand payment of their debt in full. That is, if each estate had been large enough to pay a dividend of fifty per cent, the dividends from both, if apportioned to it, would have satisfied the claim. By the rule which was adopted by the court below, if John Miller's estate had paid fifty per cent, and a dividend of fifty per cent had been subsequently declared in Amos Miller's estate, the appellants would have been confined to a *pro rata* distribution on the balance remaining due, and one full quarter of their claim would have been left unpaid. Surely a rule that would so divert funds admittedly adequate as to make the satisfaction of an uncontested debt impossible, would be neither sound, nor safe, nor just.

Decrees reversed.

ROLLAND V. COMMONWEALTH.

(88 Penn. St. 806.)

Grand jury. Burglary — breaking out.

It is no ground for quashing an indictment for burglary in breaking into a bank, that two of the grand jurors by whom it was found were stockholders of the bank.

Defendant entered a house without breaking for the purpose of committing a felony, but broke out in making his escape. *Held*, not burglary at common law, and that the statute of Anne making it burglary was not in force in Pennsylvania.*

INDICTMENT for burglary. The facts were in substance, that the defendants, intending to gain an entry into a bank building to rob the bank, called in the evening at the cashier's house, which was in the rear of the bank, and asked for the cashier, saying that they wished to transact some private business with him. The cashier was not then at home, and they went away. They called again twenty minutes later, and were then shown into the cashier's office, without saying any thing as to the pretended object of their visit. After a short interview with the cashier they assaulted him, seized certain property of the bank, opened the door and departed with it. At the trial the defendants moved to quash the indictment for the reason that two members of the grand jury were directors and stockholders of the National Bank of Chambersburg, upon whose premises the alleged offense was committed. This motion was also overruled.

A number of errors were assigned, but only two are of importance.

The jury rendered a verdict of guilty.

J. McD. Sharpe and Duncan & McGowan, for plaintiff in error.

O. C. Bowers and Kennedy & Stewart, for defendant in error.

PAXSON, J. [After deciding minor points.] What has been said applies as well to the motion to quash the indictment as to the challenge to the array. In support of the former motion, there was, however, the additional reason that two of the grand

* See *contra*, *State v. Ward*, 21 Am. Rep. 665; S. C., 43 Conn. 492.

Rolland v. Commonwealth.

jurors were stockholders in the National Bank of Chambersburg. This was no ground to quash the indictment. It might have been a ground of challenge as to the particular jurors. It is well settled that a grand juror may be challenged for cause. This is the current of the English authorities. It was allowed in this country in the trial of Col. Burr, and in this State in an Oyer and Terminer case tried before TILGHMAN, C. J., and BRECKINRIDGE, J., in 1814, 2 Browne, 323.

* * * * *

The answer to the fourth point was error. The mere unlatching or breaking of a door in an attempt to escape is not burglary in this State. We do not think it was ever so at common law. It is true it was at one time asserted to be so by Lord BACON and other eminent English lawyers, but it was denied by authority of equal weight; notably by Sir MATHEW HALE, by Lord HOLT and by TREVOR, C. J., in *Clark's Case*, 2 East's P. C., ch. 15; in 1 Hale, 554. where it is said: "If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this, I think, is not burglary, for *fregit et exivit non fregit et intravit*." And see Black. Com., vol. 4, p. 223. This difference of opinion among eminent jurists in England led to the passage of the statute of 12 Anne, which, after referring to the doubt on the subject, provides that a breaking out of a dwelling-house by a burglar in the night-time, in an attempt to escape, was a sufficient breaking to sustain a conviction. This statute was subsequently repealed by the statute of 7 and 8 Geo. 4, ch. 27, and re-enacted by 7 and 8 Geo. 4, ch. 29. The passage of the act of 12 Anne is strong evidence that it was not the common law. No such statute was ever enacted in Pennsylvania, and I am not aware of any decision recognizing such a rule here. In the fifth report of the English commissioners on criminal law, we find the following remarks on burglary, which are so forcible, and bear so directly upon this point, as to justify their admission here: "By the statute of 12 Anne, ch. 1, § 7 (subsequently repealed and re-enacted), the crime of burglary was extended to the case of an offender who, having committed a felony in a dwelling-house, or having entered therein with intent to commit a felony, afterward broke out of such dwelling-house in the night-time. This extension does not, we think, rest upon just principles. After a felony has been committed within the dwelling-house, the offense is not in

Seely v. Pittsburgh.

reality aggravated by lifting the latch of a door, or the sash of a window, in the night-time, in order to enable the offender to escape. A breaking out, indeed, may be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime, and the extension of the law of burglary to such a case is not warranted by the principles upon which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender, or the mischief of the act, is made deeply essential to the crime. It is ineffectual, even with a view to the object proposed; the pretext for the conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance."

Judgment reversed and set aside.

SEELEY V. PITTSBURGH.

(82 Penn. St. 300.)

Assessments for local improvements — rule as to — constitutional law.

A statute provided that the cost of improving streets and roads should be assessed upon the abutting property in proportion to the frontage. *Held*, unconstitutional as applied to rural or suburban property.

SCIRE FACIAS sur municipal claim brought by the city of Pittsburgh against Seely, to recover an assessment. Penn avenue, in said city, was paved and improved in pursuance to a statute authorizing such improvements to be made, and the expense thereof to be assessed upon the abutting property in proportion to its frontage. The defendant Seely was owner of land abutting on said avenue, which was assessed for the improvement.

The opinion states other facts.

On a case stated for the opinion of the court, the court entered judgment for the plaintiff, and the defendant took writ of error.

J. W. Kirker & M. A. Woodward, for plaintiff in error.

George Shiras, Jr., & Thomas S. Bigelow, for defendant in error.

AGNEW, C. J. It is fortunate for the rights of the people when a case occurs causing the courts to pause and to retrace the boun-

Seely v. Pittsburgh.

dary of delegated power. Thus the stealthy steps of invasion may be detected and the power denied, ere it be too late and a precedent become fixed beyond judicial control. This is such a case. The attempt is to apply, here, the frontage rule of valuation of compact city lots to a rural population, and make farm property and town lots indiscriminately pay for an expensively paved city highway, under the name of a street, running far out into the country. The assumption is that by the addition of extensive rural districts to a city, the whole surface is brought by the legislative power within the sphere of city taxation for municipal purposes; and cases are cited of local or special taxation for local purposes, as justifying this stretch of power. But seeming analogies must not be allowed to lead our minds astray. Fortunately this subject has been examined in several recent cases, leading to a fuller development of the principles at the foundation of this power. Prominently among them is *Hammett v. Philadelphia*, 15 P. F. Smith, 146; S. C., 3 Am. Rep. 615, and *Washington Avenue*, 19 P. F. Smith, 352; S. C., 8 Am. Rep. 255. In the early cases the mode of determining the benefits, to pay the damages and the cost of construction, was by actual view and assessment. *McMasters v. Commonwealth*, 3 Watts, 292; *Fenelon's Petition*, 7 Barr, 173; *Extension of Hancock street*, 6 Harris, 26. These were followed in the later cases of *Commonwealth v. Woods*, 8 Wright, 113; *McGee v. Pittsburgh*, 10 id. 358; *Wray v. Pittsburgh*, id. 365. Afterward came the frontage mode of equal valuation per foot front. *Schenly v. Allegheny*, 1 Casey, 128; *Philadelphia v. Tryon*, 11 id. 401; *Schenly v. Allegheny*, 12 id. 57; *McGonigle v. Allegheny*, 8 Wright, 118; *Stroud v. Philadelphia*, 11 P. F. Smith, 255. In none of these cases was there a close examination of the per foot front rule, but it seems to have been assumed as a convenient approximation where the property fronting on the street was of a kind and not differing much in value. But in *Washington Avenue* it is shown that this mode of valuation is but a substitute for actual assessment. It is there said: "So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burthens, it cannot be said to exceed the legislative power of taxation when exercised for proper objects. It is on this ground only that assessments according to the frontage of property on a public street to pay for its opening, grading and paving, can be justified. As a

practical result in cities and large towns the per foot front mode of assessment reaches a just and equal apportionment in most cases." Again: "But it is an admitted substitute only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties." "But this rule as a practical adjustment of proportional benefits can apply only to cities and large towns where the density of population along the street and the small size of the lots make it a reasonably certain mode of arriving at a true result. To apply it to the country and to farm lands would lead to such irregularity and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at first blush every one would pronounce it to be palpably unreasonable and unjust."

It needs no reasoning to prove the soundness of these views.

That the benefits a property owner receives from an improvement can be ascertained only by a reasonable mode of assessment is plain. And, that to measure the fronts of all the abutting properties and divide the cost by an equal charge per foot front upon each, is not an assessment of advantages, but simply an arbitrary mode of charging, is equally plain. Therefore, to be just and equally fair to each, it is evident all the owners must stand in like, or in reasonably equal, circumstances; otherwise the charge is an exaction, not a fair assessment. The cases of frontage cited, so far as discoverable, were of city lots in close juxtaposition. The frontage rule, when applied to such cases, is not denied. As remarked in Washington avenue, "Whatever doubt might have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision it would ill become us now to unsettle its foundation by disputing its principle." These remarks will enable us to test the case before us. The law under which the proceeding took place was peculiar, and in some respects extraordinary. It was passed April 2, 1870 (Pamph. L. 796). A marked feature is that it gives power to a majority of the abutting owners on Penn avenue, between St. Mary's avenue and the eastern boundary of the city of Pittsburgh, a distance of about three miles, to elect a commission of five citizens, without any previous ordinance or subsequent control of the city. The only assent of the city required was its approval of the act before its taking effect. Then

Seely v. Pittsburgh.

the commissioners were to determine the kind of pavement, contract for the work, make requisitions on the city for bonds, and sell them to raise money to pay the contractors. When the avenue was completed it was to come under the city control. The commissioners were to ascertain, on completion, the entire amount of bonds sold by them and the interest, and this should be taken to be the cost of the improvement and assessed equally per foot front upon the abutting properties. They were to give notice, and within twenty days might correct errors. After that their judgment became final, without appeal. Now, though technically it may be said the improvement was made under municipal authority, because of the general approval of the act by the city, yet, in fact, the improvement is made by a majority of the owners, the minority *volens volens*. It is perhaps not beyond the power of the legislature to authorize the work to be done by such a commission, but it will be seen that practically the voice of the property owner who objects to be thus charged with the expense is not heard even through his representatives in the city councils. The municipal authority cannot even intervene for his protection. Now, without resting a decision on these marked features of the law, they constitute strong reasons for a rigid examination into the power of the legislature to authorize the frontage rule to be applied to this case. The east end of Penn avenue, upon which this improvement is made, extends from St. Mary's Cemetery, near the United States Arsenal, eastward for about three miles, as shown by the distances upon the plot made part of the stated case; passing in that distance the grounds of several cemeteries and through lands partly farms, partly large rural residences, partly smaller lots, and partly the lots of several hamlets and villages, which were taken into the city territory. The avenue is a broad, wood-paved highway, after the manner of a city street, and its cost, as evidenced by the bonds issued, was \$356,500, while the cost per foot front, as evidenced by the map and the charge, was within a small fraction of ten dollars; the defendant's lot being $108\frac{48}{100}$ feet front, and his assessment \$1,073.84. The bonds which, under the 16th section, were made the cost of the improvement, were made up of the contract price and the incidental expenses. The contracts were to be let by the commissioners, without supervision, the law providing for no settlement of their account, and the expenses were such as might be determined by the commissioners to be incidental and subject to

no review. The commissioners were, no doubt, reputable men, and so far as their personal supervision went, their duties were performed, no doubt, faithfully. Yet, such a system, which subjects the property-holders to jobbing contracts and ingenious expedients, such as men bent upon making all they can out of their jobs, and to patent-right claims for wooden streets, which rot out in seven or eight years, without a power of self-protection or the control of even their representatives in councils, is not to be viewed complacently. How near the actual value of the improvement approximated the estimated bond cost may be inferred when it is seen that the whole cost was \$350,000, and the per foot cost ten dollars. This blending of town and country, of city lots and farm lands, of the residences of the living and the graves of the dead, constitute a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage or per foot front rule cannot be applied to it. It is so plainly, palpably, rankly and ruinously unjust, it must be pronounced no proper or lawful mode of special taxation, but an injustice so rank is therefore void as against the right of property as protected by the Bill of Rights. The ground of this has been so distinctly stated in the Washington avenue case it need not be re-stated here. 19 P. F. Smith, 363. A fixed sum to be paid per foot, without regard to the character, kind, value or extent of the property, is an exaction, not a just assessment according to benefits. The extent, back to which the lien runs (120 feet), merely limits the quantity to be taken, but does not change the kind, character or value of the property upon which the fixed charge is fastened.

But it is held that Seely's lot is in a village, and, therefore, the per foot rule may apply to him. Possibly this might have been the case had the streets of that village alone been improved. But this is not its character. The act assumes to make a wide and costly avenue, extending long distances through rural lands, where it is not needed, and to make the cost of the whole the measure of the cost of each owner. It makes a unit of the entire distance, where the per foot front rule obtains, and where it does not obtain, and then divides this integer into fractions of a foot, imposing on the defendant his proportion of the fractions. Such a mode of charging might be continued for any indefinite distance over the State, and the owner of each lot in every village through which the line passes be made to pay his per foot charge of the entire

Seely v Pittsburgh.

route. The principle of such a system is wrong, and, therefore, cannot be applied even to the village lot owner. If the rural portions of the route be exempt, as clearly they must be, then must all others be also, for the system itself is founded on a general *error*. If this case be examined closely, what is it but a repetition of the Hammett or Broad street case in principle, differing only in form. Penn avenue, like Broad street, is a grand thoroughfare, designed for the use of the people of the city proper, where they may ride out into the country for pleasure or profit. That it is a great useful public improvement, so long as its wooden pavement lasts, no one will deny. But it is this very public character for general use, and not for local benefit through the farms and along the cemeteries, which should protect the owners along the route from special taxation. More literally and directly the case is governed by the case of the Washington avenue, which it resembles more closely in form and fact.

More than once, lately, we have had occasion to reprehend that legislation which seeks to cast the burdens of the public on the shoulders of individuals, often bringing ruin on men of moderate means. Such legislation is too often the fruit of designing schemers to promote their selfish ends. We may, therefore, say that while the frontage rule is conceded to be a legal mode of assessments, when properly applied, it is not to be used as an arbitrary mode of casting the public burthens upon the property of individuals.

To prevent any misconception of the facts, we may add before closing that they come up as a stated case, and not in equity form. If there be any facts to raise an estoppel or other defense in equity the parties ought to have stated them. No motion has been made to quash the case as defective. The case itself states "that the line of said improvement in part was through what is called the rural or suburban part of the city, and the defendant's premises are situated in such rural district. The plan hereto attached is the assessment plan for said improvement, and is made part hereof." The plan referred to includes large tracts of land fronting on the avenue, whose lines and measurements noted, prove that they are not city lots. For example, St. Mary's cemetery fronts 1,000 feet, Philip Winebiddle's property 1,261 on one side and 2,427 feet on the other. The Pennsylvania Railroad Company's land 1,829. Then we find many tracts fronting 300 to 400 feet, 400 to 500, 500 to 600, 600 to 700, 700 to 800, 800 to 900, and 900 to 1,000.

Darlington v. The United States.

The facts of the case, therefore, distinctly appear, and we ought not of our own motion to quash the case.

The judgment of the court below is, therefore, reversed, and the judgment is now entered for defendant for costs.

PAXSON, J., filed a dissenting opinion.

DARLINGTON V. THE UNITED STATES.

(88 Penn. St. 382.)

Eminent domain — by the United States.

The United States may exercise the right of eminent domain within a State; but a State cannot exercise it in behalf of the United States.

PETITION on behalf of the government of the United States to appoint appraisers to appraise the value of property selected in the city of Pittsburgh as a site for United States government buildings, in pursuance of an act of Congress. The appraisers were appointed and made their report, to which Darlington, the owner of the land selected, excepted. The court overruled the exceptions, and Darlington took a writ of error and also a writ of certiorari.

D. T. Watson and J. W. Over, for Darlington.

H. H. McCormick and G. P. Hamilton, for the United States.

PAXSON, J. The right of the United States to take private property for public use is too well settled to be now disputed. Of the numerous cases upon this subject it is sufficient to refer to *Kohl v. The United States*, 91 U. S. 367. The opinion of the court was delivered by Mr. Justice STRONG, who said: "The right of eminent domain is inherent in all governments by virtue of their sovereignty. For all purposes required by the Constitution this right exists in the United States independently of any consent of the State in which the property lies." The right itself arises from necessity, of which necessity the sovereignty taking the property must be the judge, and is qualified only by the duty of making compensation to the owner. We are in no doubt, therefore, as to the

Darlington v. The United States.

right of the United States to make and condemn a site for public buildings in the city of Pittsburgh, under and by virtue of the act of Congress approved March 3d, 1873, entitled, "An act to purchase a site for public buildings in Pittsburgh." Said act provides, "that the secretary of the treasury be and he is hereby directed to purchase at private sale, or, if necessary, by condemnation, in pursuance of the statutes of the State of Pennsylvania, a suitable piece of ground in the city of Pittsburgh, in the State of Pennsylvania, for the erection of a building to be used for a court-house, custom-house, post-office, United States marshal's office and other government offices, the cost of the same not to exceed three hundred thousand dollars." Here the power to take is expressly conferred, and the mode designated by which the owner or owners may receive compensation. The condemnation in case of a failure to purchase shall be "in pursuance of the statutes of the State of Pennsylvania." The proviso in said act, that the State shall release and relinquish jurisdiction over the same, is fully met by the act of assembly of April 2d, 1873 (Pamph. L. 42). We, therefore, think it was competent for the United States authorities to proceed under said act of Congress to purchase, or condemn, if necessary, a site for public buildings, in the city of Pittsburgh. Have they proceeded to do so according to law? Without entering into a tedious recital of the facts it is sufficient to say, that it appears from the record in this case that proceedings have been commenced to condemn four different sites, with a view of selecting one out of the four. There is no warrant for this in the act of Congress. It authorizes the selection of one site, but it does not create a roving commission to experiment upon the values of different sites. It is said, however, that this action can be sustained under the second session of the act of assembly referred to, which provides, "that the United States may pay the costs and refuse to take the land, if in their judgment the compensation assessed therefor is excessive." The most that can be claimed for this section is, that in case the United States should select a site, and the damages assessed should be found excessive, and no terms could be made with the owner, the United States might pay the costs, abandon the proceedings and then proceed to condemn another site. It could not be held to justify proceedings against an indefinite number of sites at the same time, and thus chaffering with the respective owners for the lowest price. And if such construction could be

Darlington v. The United States.

successfully claimed for it the answer is that the legislature has no such power. The State may take the property of a citizen for public use by virtue of its right of eminent domain, but it cannot take it for the benefit of another sovereignty, for the use of the citizens of the latter, nor can it delegate its right of eminent domain to another sovereignty for such purpose. I am aware that it has been held otherwise in *Gilmer v. Lime Point*, 18 Cal. 229, and in *Burt v. The Merchants' Insurance Co.*, 106 Mass. 356; S. C., 8 Am. Rep. 339. But a different doctrine was asserted in *Trombly v. Humphrey*, 25 Mich. 471; S. C., 9 Am. Rep. 94. In that case, speaking of the exercise of the power by the State for the United States, the court says: "For the one to enter the sphere of the other and supply its officers and machinery in the exercise of its eminent domain for the benefit of the other, would not only be as much without warrant, but also as much a work of supererogation as for the United States to exercise the like authority and employ the like agencies for a foreign country." Again: "The eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general government under and by means of which it is to appropriate land for national objects is not among the ends contemplated in the creation of the State governments." The foundation of the right of eminent domain is necessity. The reason utterly fails when one sovereignty proceeds to take land for the use of another sovereignty. This seems to be the view taken by the Supreme Court of the United States in *Kohl v. The United States*, *supra*. Says Justice STRONG: "The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond this there exists no necessity, which alone is the foundation of the right." It is not a sufficient answer to this to say that the public buildings proposed to be erected are for the accommodation of our own citizens. That is a secondary object. The primary object is the accommodation of the business of the United States government, and the convenience and comfort of its officials. The citizens of this State have no rights in said buildings not common to all other citizens of the United States, nor have they any control over them.

The court then passed upon certain objections to the proceedings, holding that they were defective.

Judgment and proceedings reversed.

Insurance Company v. O'Maley.

INSURANCE COMPANY v. O'MALEY.

(82 Penn. St. 400)

Fire insurance — condition avoiding policy — "levy on" property.

A policy of insurance on a building was conditioned to cease at and from the time that the property "shall be levied on or taken into possession or custody under any proceeding in law or equity." A mechanics' lien was filed against the building, judgment rendered and execution issued thereon, and the property was advertised to be sold. Before the day of sale the building was burnt. *Held*, that the levy did not terminate the risk, and that the insurers were liable.

Seem that the condition avoiding the policy in case the property "shall be levied on or taken into possession," had special reference to personal property.

ACTION of covenant on a policy of insurance against fire.
The facts of the case are set forth in the following opinion of STERRETT, P. J., which was approved by the Supreme Court.

STERRETT, P. J. "The company defendant took a risk of \$1,000, for one year from the 4th of April, 1874, on the house of Mrs. O'Maley, and issued their policy therefor in her name.

"On the 1st day of December, 1874, the building was destroyed by fire, of which the company had notice, but they refused to make good the loss, and suit was brought in the right of Mrs. O'Maley, to recover the insurance money. The only defense presented by the defendant's affidavit and urged on the trial was, that after the policy was issued, a mechanics' lien was filed against the building for \$21.68, judgment obtained thereon, *levari facias* issued and placed in the hands of the sheriff, and, before the fire occurred, the property was advertised to be sold on the 7th day of December, 1874; that, according to one of the conditions of the policy, the insurance ceased at and from the time the *levari facias* was issued, and, therefore, the company was not liable.

"The condition referred to is as follows, viz.: 'XI. The insurance by this policy shall cease at and from the time that the property hereby insured shall be levied on, or taken into possession or custody under any proceeding in law or equity.'

“It was admitted that the company had received the premium, and it was not pretended that there was any want of good faith on the part of the insured, or that the terms and conditions of the policy had been violated in any manner, except in the particular above stated. It was a *bald eagle* defense, grounded on the *letter* of the condition in the policy, in connection with the fact that a *levari facias* had been issued, and the property advertised for sale.

“We were satisfied at the time of the trial that the construction of the policy contended for by the learned counsel for the company was erroneous, and would work great injustice, but he expressed such confidence in his position that we concluded to reserve the question and instruct the jury, *pro forma*, that the proceedings under the mechanics' lien did not constitute a valid defense, and a verdict was rendered in favor of the plaintiff for the amount of her claim, subject to the opinion of the court in banc on the question of law reserved, viz.: ‘Whether, under the 11th condition of the policy, the insurance ceased and the liability of the company was ended before the loss occurred, by reason of the proceedings had on the mechanics' lien.’

“The plaintiff sought to raise other questions, but they were considered immaterial; and their right hinges entirely on the construction to be given to the condition just quoted. If the defendant's construction be correct, judgment must be entered for the company, notwithstanding the verdict; otherwise, the plaintiff is entitled to judgment for the amount found by the jury.

“While the general law of insurance provides necessary safeguards for the protection of underwriters against fraud and imposition on the part of the insured, it is undoubtedly competent and proper for them to incorporate in their contracts of insurance special terms and conditions calculated to secure the most ample protection against fraud and dishonesty; and all such terms and conditions, designed to guard against increase of risk and every species of fraud to which the insurer may be subjected, should be fairly construed with reference to the object sought to be attained. Beyond this, harsh or sharp conditions should not be favored. ‘Sometimes policies are seen, in the language of the learned judge who delivered the opinion of the court in *West Branch Ins. Co. v. Helfinstein*, 4 Wright, 300, ‘bristling all over with sharp conditions,’ on which those who have been so unfortunate as to have their property destroyed by fire may be impaled at the pleasure of

Insurance Company v. O'Malley.

the underwriter. Such one-sided policies are not to be commended. They may be used as a snare for the unwary, and are not calculated to accomplish any practical good. Fortunately, they are of very rare occurrence. The policy before us is not one of this class; but to give it the construction contended for would be a decided step in that direction, and, in our judgment, would work great injustice.

“The company received the ordinary premium for the risk assumed. The building was occupied by the insured and her family all the time, without any interference with her possession by the sheriff or any one else. No lack of good faith is, in any manner, imputed to her, and nothing whatever was done to increase the risk. Why then should the company, with the plaintiff's money in their treasury, be absolved from their obligation to make good the loss? We are answered, simply because an execution on the mechanics' lien was issued, and the sheriff advertised the property for sale.

“Such a construction, having no practical bearing on or connection with the risk, surely could not have been intended, and should not be given unless there is no escape from it. If the condition is construed as having in view a loss attended with an actual seizure and interference with the possession of the insured, whereby the risk might be increased, we can at once recognize its wisdom and propriety; and doubtless it was this that was intended, and nothing more.

“The condition in question has *special* if-not *exclusive* reference to personal property which, when levied on, is usually seized *in fact* and remains in the custody and possession of the sheriff until it is sold. This works an involuntary change of possession — takes the property out of the owner's control and leaves it in charge of the sheriff and his employees, who cannot be expected to guard it with the same degree of care that the owner would. Hence, a levy and *actual* seizure necessarily increases the risk, and it is this that the condition is designed to guard against; but it has no applicability in the case of a *technical* seizure, unattended by change of possession or increased risk.

“We conclude, therefore, that the phrase ‘levied on,’ as employed in the policy, does not mean a technical levy, unaccompanied by actual seizure and change of possession, and has no

Insurance Company v. O'Maley.

application, ordinarily, to proceedings by suit of *levari facias* for the sale of real estate.

“In *The Commonwealth Insurance Co. v. Berger et al.*, 6 Wright, 285, a condition precisely the same as that before us was construed by the Supreme Court. In that case, after the policy was issued, and before the fire occurred, an execution was placed in the hands of the sheriff, and a levy was made on the goods of the insured, but they were not taken into the custody of the officers, or left in charge of a watchman, nor was the actual possession of the insured disturbed. While this condition of affairs existed the goods were destroyed by fire, and the insurance company defended against payment of the loss on the ground that the insurance ceased when the levy was made. The court held that the levy did not terminate the risk, and that the company was liable.

“The principles of this case rule the one before us; the fact that the levy was on personal property cannot change the principle of construction. If there is any difference, the reason would be still stronger in the case of a levy on real estate, which is always a mere technical seizure without any interference with the possession — at least until after sale.

“The plaintiffs are therefore entitled to judgment.”

The defendant took this writ, and assigned for error the entry of judgment for the plaintiffs on the question of law reserved.

William L. Chalfant, for plaintiff in error.

W. H. Sutton & Son, for defendants in error.

PER CURIAM. The judgment of the court below is sufficiently sustained in the opinion of Judge STEBBETT.

Judgment affirmed.

INDEX.

ACKNOWLEDGMENT.

Of deed—certificate of.] See DEED, 128.

To a stranger will not defeat the statute of limitations.] See LIMITATION OF ACTIONS, 280.

ACTION.

1. *For property wrongfully taken.] Assumpsit will not lie for the value of personal property against one who has wrongfully taken it, provided he still has it in his possession; the action must be tort. Mosses v. Arnold (Iowa), 239, and note, 242.*

2. *Lis pendens — effect of delay in prosecuting action.] The benefit of the rule relating to lis pendens may be lost by such long-continued inaction as amounts to gross negligence in the party prosecuting, when such inaction is to the prejudice of innocent persons. Fox v. Reeder (Ohio), 870.*

3. *—.] A mortgage was executed in 1837, upon which bill of foreclosure was filed in 1840, decree taken and order for sale issued in 1842. Save continuances, no further action was had in the case until 1868. In the meantime, the mortgagor, who had remained in open and notorious possession, had sold portions of the premises to innocent purchasers, without actual notice of the pending suit. Such purchasers, and those under whom they claimed, had remained in actual possession more than twenty-one years, when the plaintiff in the foreclosure suit, in 1869, caused to be issued another order of sale. Held, that the failure to take any action in the cause from 1842 to 1868, unexplained, was such negligence as prevented an enforcement of the decree against actual purchasers, without actual notice. Ib.*

For enticing away servants.] See MASTER AND SERVANT, 475.

When it lies for deficiency in sale of land.] See VENDOR AND PURCHASER, 750.

ADMINISTRATION.

Statutory allowance to widow — effect of ante-nuptial agreement upon.] A statute provided that upon the death of a married man certain specific articles should be allowed to his widow. Held, that such allowance was for the benefit of both widow and children, and that where there were children the allowance could not be affected by an ante-nuptial agreement. Phelps v. Phelps (Ill.), 149.

See ADMINISTRATOR ; EXECUTOR.

ADMINISTRATOR.

Sale by — by whom to be made — sale by auctioneer.] Where an administrator is authorized by a decree of court to sell land for the payment of debts, the sale must be made by him personally or by his agent in his presence. If made by an auctioneer in the absence of the administrator it is not valid. *Sebastian v. Johnson* (Ill.), 144, and *note*, 145.

Liability of, for rents unlawfully collected.] See WIDOW, 863.

ADMIRALTY LAW.

See JURISDICTION, 897.

AGENT.

Of carrier — fraudulent issue of bill of lading by.] See CARRIER, 26, 608.

When individually liable on notes.] See NEGOTIABLE INSTRUMENTS, 175, 177.

AGREEMENT.

See CONTRACT.

ALTERATION OF INSTRUMENTS.

See NEGOTIABLE INSTRUMENTS.

AMENDMENT.

See GRAND JURY, 553.

ANIMALS.

1. *Injury to dog — license — statutory construction — "any person."]* A statute authorized "any person" to kill a dog going at large and not licensed and collared. In an action to recover for the killing of plaintiff's dog by defendant's dog, *held*, no defense that plaintiff's dog was not licensed and collared, as defendant's dog was not a "person." *Heisrodt v. Hackett* (Mich.), 529.

2. *Liability of owner of dog for injury.]* One injured by the bite of a dog may recover damages of its owner on proof that the dog was vicious and that the owner knew it, without showing that it had ever before bitten any one. *Rider v. White* (N. Y.), 600.

ARREST.

Unlawful detention.] See ASSAULT, 669.

ARSON.

Liability of servant who burns his master's house by procurement of master.] A servant who sets fire to his master's house by his master's procurement for the purpose of defrauding the insurers is not guilty of arson either at common law or under a statute making it arson to burn the dwelling-house of another. *State v. Haynes* (Me.), 569.

ASSAULT.

Arrest — unlawful detention.] A constable arrested, without warrant, a person who was intoxicated, and imprisoned him in the "lock-up" until he

became sober, when he discharged him without taking him before a magistrate. *Held*, that the constable was guilty of a criminal assault and battery. *State v. Parker* (N. C.), 669.

ASSESSMENT.

Of damages for right of way of railroad.] See RAILROAD, 311.

ASSESSMENTS FOR LOCAL IMPROVEMENTS.

Rule as to — constitutional law.] A statute provided that the cost of improving streets and roads should be assessed upon the abutting property in proportion to the frontage. *Held*, unconstitutional as applied to rural or suburban property. *Seeley v. Pittsburgh* (Penn.), 760.

See CONSTITUTIONAL LAW, 331.

ASSETS.

Fund due from charitable societies.] See POWER, 52.

ASSIGNEE.

See BANKRUPTCY.

ASSIGNMENT.

1. *Set-off.*] The assignment of a non-negotiable demand, arising on contract, before due, defeats a set-off by the debtor of an independent cross-demand, on which no right of action had accrued at the time of the assignment. *Fuller v. Steiglitz* (Ohio), 312.
2. *Conflict of laws.*] An assignment of personal property and choses in action by an insolvent debtor for the benefit of creditors, in conformity to the laws of the State of New York, where such debtor resided and did business, operates to transfer the right of action to recover said choses in action to the assignee, and he may maintain an action as such assignee in the courts of this State, to collect the same, although said assignment, as authorized by the laws of New York, gives preferences to certain of the creditors. *Ib.*
3. *Lex domicilii.*] In case of such an assignment of choses in action, the law of the domicile of the assignor controls and determines what is a sufficient transfer to authorize the assignee to collect the same. *Ib.*
4. *Action by assignee—inter-state comity.*] The principles of comity between States will allow such assignee to maintain an action, in the courts of this State, against one of its citizens, to collect the same, notwithstanding such preferences, in the absence of any set-off or other defense to such action, or of any lien or charge against said claim under the laws of Ohio by the debtor. *Ib.*

Of trade-mark.] See TRADE-MARK, 44.

ASSUMPSIT.

For property wrongfully taken.] See ACTION, 239.

ATTACHMENT.

Of exempt property — homestead.] See BANKRUPTCY, 272.

ATTORNEY.

Cannot confer jurisdiction.] See JUDGMENT, 840.

BAILMENT.

1. *Of stocks — action.]* G., owning shares of the Marietta and Cincinnati Railroad stock, in 1856-7, transferred the same to F., who gave to G. written obligations for its return, substantially as follows: "Borrowed of William Greene one hundred and nine shares of Marietta and Cincinnati Railroad stock, drawing interest at eight per cent, to be returned on demand." Afterward, the Marietta and Cincinnati Railroad Company, having become hopelessly insolvent, in 1880, a mortgage on the road was foreclosed; all its property and rights sold; sale confirmed and deed made to the purchaser; and afterward all the property, rights and franchises of the Marietta and Cincinnati Railroad Company having been conveyed to a new corporation, the old corporation ceased to exist in fact, and its stock, from that time on, ceased to have a legal existence, and had no value. *Held*, the transaction between G. and F. was in the nature of a *mutuum*, and payment in discharge of the loan could be made by a return of an equal number of shares of stock of the Marietta and Cincinnati Railroad Company without regard to its market value. *Frederick v. Greene* (Ohio), 828.
2. *Of stocks to be returned on demand.]* When, by the terms of the contract, the borrowed stock is to be returned on demand, it is meant that an equal number of shares of stock of the same company shall be returned, and no cause of action accrues to G. until demand is made or waived, or fact exists that avoids the necessity for demand. *Ib.*
3. *—.]* The financial condition of the Marietta and Cincinnati Railroad Company; the subsequent existence, or non-existence of the corporation, or its stock as a representative of value, will not affect the construction of the contract. Its terms determine the duties and liabilities of the parties each to the other. *Ib.*
4. *Demand.]* If the lender has made no demand during the legal existence of such old company, or of its stock, and until after a return of such stock has become impossible, without fault of the borrower, his right to a return of such stock is gone, and he is not damaged by a failure afterward to return the same. *Ib.*
5. *Damages.]* When a cause of action does accrue in such case, the measure of damage will be the market value of such stock at the time the cause of action accrued. If at that time the stock was worthless, only nominal damages can be recovered. *Ib.*

By national bank of deposits for safe-keeping.] See NATIONAL BANK, 85

BANKS AND BANKING.

1. *Forged check — recovery by drawee of money paid on.]* The defendant received a check in good faith and for value, but afterward had reason to doubt its genuineness. He presented it to plaintiff's bank, on which it was drawn, and demanded payment without disclosing his suspicions. The teller expressed doubts as to the signature, but said he would pay it

if defendant would indorse it, which he did. *Held*, that the plaintiff on finding that the check was a forgery might recover back from the defendant the money paid on it. *First National Bank v. Ricker* (Ill.), 104.

2. *Bank check — effect of.*] Where a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and a transfer of the check carries with it the title to the amount named in the check to each successive holder. *Union National Bank v. Oceana County Bank* (Ill.), 185, and *note*, 186.

See NATIONAL BANK.

BANKRUPTCY.

1. *Jurisdiction of State court.*] On a petition to the District Court of the United States by partners to have the partnership adjudged bankrupt, personal service was made without the district on a partner refusing to join in the petition. *Held*, insufficient and that a State court would hold an adjudication of bankruptcy on such service void as to such partner. *Isott v. Stuart* (Ill.), 194.
2. *Will not be enforced in State court — sale valid under State law but void in bankruptcy.*] A State court will not annul a sale valid under the State law because it was designed to give a preference to a creditor, prohibited by the bankrupt act. *Bromley v. Goodrich* (Wis.), 685.
3. *Damages.*] A, being indebted to plaintiff, conveyed to him property by a sale valid under the State law. The property was afterward seized by the sheriff under an attachment as the property of A in a suit by other creditors. A was declared a bankrupt, and the property was taken from the sheriff's possession under a warrant from the bankrupt court and sold by the assignee in bankruptcy, without any adjudication that the sale to B was void. *Held*, that the plaintiff was entitled to recover the full value of the property from the sheriff and attaching creditors. *Id.*
4. *Homestead — attachment of exempt property.*] An attachment was levied on land of a debtor which afterward became his homestead; afterward, and within four months of the attachment, the debtor was adjudged a bankrupt. *Held*, that the homestead did not pass to the assignee in bankruptcy, and that the bankruptcy did not dissolve the attachment. *Robinson v. Wilson* (Kan.), 272.
5. *Title of assignee.*] An assignee in bankruptcy, in the absence of fraud, takes no title to land of the bankrupt as against a grantee of the bankrupt by deed made before bankruptcy, although the deed is not recorded, and the receiver had no notice of it. *Goss v. Coffin* (Me.), 585.

Agreement not to bid at assignee's sale void.] See CONTRACT, 6.

BETTERMENTS.

See ASSESSMENT FOR LOCAL IMPROVEMENTS; CONSTITUTIONAL LAW, 831.

BENEVOLENT SOCIETY.

See POWER, 52.

BIGAMY.

Void second marriage.] It is no defense to an indictment for bigamy that the second marriage was between persons forbidden by statute to intermarry—as between a negro and a white woman. *People v. Brown* (Mich.), 581.

BILLS.

See NEGOTIABLE INSTRUMENTS.

BILL OF LADING.

Fraudulent issue of, by agent.] See CARRIER, 26, 608.

BONDS.

Right of city to tax its own bonds.] See MUNICIPAL CORPORATION, 14.

Municipal—defective execution.] See MUNICIPAL BONDS, 141.

Over-issue.] See MUNICIPAL BONDS, 215.

Void municipal—action to restrain tax for—who may bring.] See TAXATION, 264.

BURDEN OF PROOF.

Of contributory negligence.] See NEGLIGENCE, 714.

BURGLARY.

Breaking out.] Defendant entered a house without breaking for the purpose of committing a felony, but broke out in making his escape. *Held*, not burglary at common law, and that the statute of Anne making it burglary was not in force in Pennsylvania. *Rolland v. Commonwealth* (Penn.), 758.

BURIAL.

See CEMETERY.

BURIAL GROUNDS.

See CEMETERY; CONSTITUTIONAL LAW, 71.

CANVASS.

See ELECTION.

CAPITAL STOCK.

Of national bank—increase of.] See NATIONAL BANK, 1.

CARRIER.

1. *Bill of lading—fraudulent issue of, by agent.]* The station agent of a railroad company, having authority to sign bills of lading, fraudulently signed and issued a bill of lading for goods never received for transportation, and the consignee therein made advances on the faith of such bill. *Held*, that the railroad company was not liable therefor. *Baltimore and Ohio R. R. Co. v. Wilkens* (Md.), 26.

2. *False bill of lading—liability of carrier to one making advances on.]* Defendants' agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, gave M. bills of

lading for the goods mentioned in the receipt, knowing that he intended to raise money on the bills, and plaintiff advanced money to M. upon the security of the bills. *Held*, that the defendants were bound by their agent's acts and estopped from denying the receipt of the goods. *Armour v. Michigan Central R. R. Co.* (N. Y.), 608.

Damages in action against, for failure to transport goods.] See DAMAGES, 544.

CEMETERY.

1. *Restricting right of burial.] After one has purchased a lot in a cemetery, the managers thereof have no power to abridge his right of sepulture by any unreasonable limitations thereon. Mount Moriah Cemetery Association v. Commonwealth* (Penn.), 743.

2. *—.] A by-law of a cemetery association prohibiting the burial of negroes therein is void as to persons who were lot-owners when the by-law was passed. Ib.*

3. *Mandamus.] The managers of a cemetery may be compelled by mandamus to permit the burial of persons entitled to sepulture therein. Ib.*

Restrictions on.] See CONSTITUTIONAL LAW, 71.

CERTIFICATE OF ACKNOWLEDGMENT.

Sufficiency of—blanks in.] See DEED, 128.

CHARACTER.

See SLANDER, 239.

CHARITABLE SOCIETY.

See POWER, 52.

CHATTEL MORTGAGE.

Of property not yet acquired.] See MORTGAGE, 644, and note.

CHECK.

Effect of.] See BANKS AND BANKING, 185.

CITY.

See MUNICIPAL CORPORATIONS.

COMMON CARRIER.

See CARRIER.

COMPOUNDING FELONY.

See NEGOTIABLE INSTRUMENTS, 117, and note, 121.

CONFLICT OF LAWS.

Usury.] A promissory note bearing lawful interest was made in New Brunswick and secured by mortgage on lands in Maine. After the note was due illegal interest was exacted for forbearance of payment. By the law of New Brunswick usurious contracts were void and the lender forfeited both

principal and interest, but in Maine, the rate of interest was not limited. In an action to foreclose the mortgage, *held*, that the mortgagor could not avoid the mortgage as it was valid in its inception; that the statute imposing a forfeiture of the principal and interest was in the nature of a penalty and of no effect outside of New Brunswick, and that the extra interest paid was not a set-off. *Lindsay v. Hill* (Mo.), 564.

State statute restricting sales of patent rights void.] See PATENTS, 68.

Devise to foreign corporation.] See FOREIGN CORPORATION, 133.

Assignment — Action on.] See ASSIGNMENT, 812.

Validity of marriages forbidden within the State, but valid where made.] See MARRIAGE, 678, 688.

CONSIDERATION.

Of negotiable instrument—indorser cannot impeach.] See NEGOTIABLE INSTRUMENTS, 91, and note, 93.

Agreement to discontinue criminal prosecution.] See NEGOTIABLE INSTRUMENTS, 117, and note, 121.

CONSPIRACY.

1. *Sufficiency of indictment.*] An indictment charging a conspiracy to do a lawful act by criminal means must particularly set forth the means; but where the charge is a conspiracy to do an act in itself unlawful, either at common law or by statute, as to obtain money by false pretenses, and by privy tokens and devices, the means need not be specifically stated. *State v. Crowley* (Wis.), 719.

2. *What constitutes criminal conspiracy — must be against an innocent person.*] A conspiracy between two persons to defraud a third, in an unlawful enterprise in which they are all joined, is not criminal, because conspiracy is not criminal unless against an innocent person. Thus, where A and B conspired to defraud C, by falsely pretending that parcels sold by them to him contained counterfeit money, when, in fact, they contained sawdust. *Held*, that A and B could not be convicted of a conspiracy to obtain money of C by false pretenses. *Ib.*

CONSTITUTIONAL LAW.

1. *Police power, limitation of — burial places.*] The charter of a cemetery company authorized it to acquire and use land not exceeding five hundred acres for burial purposes. After it had acquired the land and spent money in preparing and adorning the same, a statute was passed forbidding the company to use any of its lands for burial purposes outside of the then inclosure, which was less than five hundred acres. *Held*, that as it did not appear that any nuisance existed or was liable to arise, the statute was not a valid exercise of the "police power," and was unconstitutional. *Town of Lake View v. Rose Hill Cemetery Co.* (Ill.), 71.

2. *Parent and child — commitment of pauper children to industrial schools.*] A statute enacted that children under a certain age, who were inmates of poor-houses, or who were abandoned by their parents, or who were without

means of subsistence, should be committed to industrial schools during minority. *Held*, not unconstitutional as authorizing imprisonment without due process of law. *Milwaukee Industrial School v. Supervisor of Milwaukee County* (Wis.), 702.

3. —.] *Semble*, that the parent or guardian of a child so committed would not be precluded by the commitment from asserting right to the custody or care of the child on proof that the cause of commitment no longer existed. *Ib.*
4. *Impairing obligation of contracts.*] The power vested in the general assembly under the Constitution of Ohio, to restrict the powers of taxation and assessment by municipal corporations, is subject to the limitations imposed by article 1, section 10, of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts," and of article 2, section 28, of the Constitution of Ohio, which declares that the general assembly shall pass no retroactive law or laws impairing the obligations of contracts. *Goodale v. Fennell* (Ohio), 821.
5. *Municipal corporations — betterments — taxation for.*] Where a statute authorized a municipal corporation to improve its streets, and make assessments on abutting lots to pay the cost thereof, and it has, after taking the necessary steps required by law and the ordinances governing in such cases, made a contract with an individual to do the work for a stipulated price, and binding itself to pay such price in assessments under such statute, which the contractor agrees to accept in full payment, the obligation of the corporation to pay in the manner stipulated cannot be impaired by a subsequent amendment of such statute, which takes away the power to make an assessment equal to the amount agreed to be paid. *Ib.*
6. —.] A subsequent statute which repeals or restricts the power of assessment so previously given, is, in so far as it affects the obligations of contracts existing at the time, a statute impairing the obligation of such contract. *Ib.*
7. —.] Unless adequate provision is made to enable the corporation to perform its existing contract obligations, such subsequent statute will be construed as prospective in its operations, and not applicable to such contracts; and it will be the duty of the corporation to be governed by the statute in force when the contract was made. *Ib.*
8. *Impairing obligation of contract.*] A State statute provided that whenever any savings bank should be found to be insolvent, the account of each depositor should be reduced so as to divide the losses equitably amongst the depositors. *Held*, that the act was not unconstitutional, either as impairing the obligation of contracts, or as being contrary to the bankrupt law, or as being retrospective in its operations. *Simpson v. City Savings Bank* (N. H.), 491.
9. —.] A legislature may vary the nature and extent of the remedy for enforcing contracts so always that some substantial remedy be in fact left. *Ib.*
10. *Retrospective law.*] A law which retroacts upon a past transaction but affects the remedy only and does not affect it injuriously, oppressively, or

unjustly, is not a retrospective law within the meaning of a constitutional prohibition. *Ib.*

11. *Statute appropriating unclaimed dividends to public uses.*] A statute provided that all dividends declared by any corporation, which should not be claimed within five years, by persons entitled thereto, should be devoted to a public use. *Held* unconstitutional. *University v. North Carolina R. R. Co.* (N. C.), 67.

12. *Due process of law — eminent domain.*] A statute required the owners of an embankment bordering a river to repair the same, when notified by the proper authorities so to do; and provided that, in case of their failure to repair, the authorities should repair; that the expense thereof should be a lien on the land, and that, in an action to enforce such lien, no plea but payment should be allowed. *Held*, unconstitutional, there being no judicial method of determining the necessity of the repairs. *Philadelphia v. Scott* (Penn.), 788.

Statute providing rule for assessing betterments.] *See* ASSESSMENTS FOR LOCAL IMPROVEMENTS.

Statute restricting sales of patent rights void.] *See* PATENTS, 63.

Exemption from taxation.] *See* TAXATION, 187.

Municipal bonds — over-issue.] *See* MUNICIPAL BONDS, 215.

"Contained in."] *See* INSURANCE, 249.

CONTEMPT.

Libel on grand jury — punishment of.] A libel on a grand jury in relation to an act already done, and not calculated directly to obstruct or embarrass the future performance of their duty, is not summarily punishable as a contempt of court. *Storey v. People* (Ill.), 158.

CONTRACT.

1. *Agreement not to bid at assignee's sale.*] A contract between two creditors interested in a public sale about to be made by an assignee in bankruptcy, that one will not bid against the other, and in consideration thereof, that the latter will pay to the former a certain sum of money, is against public policy, and, therefore, null and void. *Dudley v. Odom* (S. C.), 6.

2. *Against public policy — combinations to control trade.*] The grain dealers of a town entered into a contract, which purported to be a contract of partnership for the purpose of dealing in grain, but the real object of which was to form a secret combination to control the grain trade, and suppress competition. *Held*, that the contract was against public policy and void. *Craft v. McConoughy* (Ill.), 171.

Limiting number and location of railroad stations illegal.] *See* RAILROAD 122.

For conditional subscription to corporate stock.] *See* CORPORATION, 190.

Impairing obligation of.] *See* CONSTITUTIONAL LAW, 321, 491.

When void under the statute of frauds.] *See* STATUTES OF FRAUDS.

CONTRIBUTION.

Among sureties.] See SURETIES, 562.

Contributory negligence — burden of proving.] See NEGLIGENCE, 714.

CONVEYANCE.

Of land, when will be decreed after parol gift.] See GIFT, 57.

Covenants in deed.] See COVENANT.

CORPORATION.

1. *Note of — seal.] An instrument of writing, having in every respect the form of a promissory note, except that the corporate seal was impressed, whereby a railroad corporation promised to pay to the order of A a certain sum of money, held to be a negotiable promissory note. Central National Bank v. Charlotte, etc., R. R. Co. (S. C.), 12.*

2. *Effect of seal.] The seal of a corporation is equally appropriate as a means of evidencing its assent to be bound by a simple contract as by a specialty. Ib.*

3. *Right of officers to compensation.] Where one of the directors of a corporation is elected treasurer by the board of directors, he is not entitled to compensation for services rendered a treasurer, unless the compensation has been fixed by a by-law or resolution before the services were performed. Holder v. Lafayette, etc., R. R. Co. (Ill.), 89.*

4. *—.] Semble that if a stockholder or other person not connected with the directory perform the duties of treasurer the rule will not apply. Ib.*

5. *Conditional subscriptions to stock.] Certificates of stock in a corporation were issued and paid for under a contract in writing agreeing to subscribe therefor, and reserving to the subscriber the right to withdraw the money paid and to have the subscription canceled. Held, that the contract was void as to subsequent subscribers. Melvin v. Lamar Ins. Co. (Ill.), 199.*

Right of State to appropriate dividends of.] See CONSTITUTIONAL LAW, 671.

See FOREIGN CORPORATION

COVENANT.

For quiet enjoyment — extends to title — inability of covenantee to obtain possession.] When land conveyed with covenant of quiet enjoyment is in the possession of a stranger under paramount title who keeps out the grantee, the covenant is broken. Overruling Korte v. Carpenter, 5 Johns. 20. Shattuck v. Lamb (N. Y.), 656.

CRIMINAL LAW.

Murder — when infant subject of — independent life.] An infant, even after birth, is not the subject of murder, until an independent circulation has been established. State v. Winthrop (Iowa), 257.

Verdict upon indictment charging different offenses] See VERDICT, 666

What constitutes conspiracy.] See CONSPIRACY, 719.

See ARSON, 569 ; BIGAMY, 581 ; BURGLARY, 756.

CROPS.

Mortgage of.] See MORTGAGE, 644.

CY PRES.

See FOREIGN CORPORATION, 188.

DAMAGES.

1. *For failure to transport ordinary merchandise.] Action against a carrier for breach of his agreement to carry salt by water to a market. Held, that the measure of damage was the excess in value at the place of destination at the time when it should have arrived there, over its value at the place of shipment and the agreed rates for transportation; and that the extra expense of transporting it by land was not recoverable. Ward's Central and Pacific Lake Company v. Elkins (Mich.), 544.*

2. *For breach of contract in restraint of trade.] Where one binds himself in a sum certain not to carry on, or to allow to be carried on, any particular kind of business, within certain territory, or within a certain time named, the sum mentioned will, as a rule, be regarded as liquidated damages, and not as a penalty. Holbrook v. Tobey (Me.), 581.*

In action against bank to recover value of bonds stolen.] See NATIONAL BANK, 85.

On assessment for right of way — what included in.] See RAILROAD, 311.

In action of replevin.] See REPLEVIN, 282.

In actions of slander.] See SLANDER, 303.

In action against bailee of stock.] See BAILMENT, 328.

In action for enticing away servants.] See MASTER AND SERVANT, 475.

In an action to recover for property wrongfully attached.] See BANKRUPTCY, 685.

Liability of city for failure of water-works.] See MUNICIPAL CORPORATION, 781.

DECEIT.

See CONSPIRACY.

DECLARATIONS.

Of decedent.] See EVIDENCE, 590.

DEED.

1. *Certificate of acknowledgment — blanks in — amendment of.] The certificate of acknowledgment to a deed executed by a husband and wife certified in the usual form, that the grantors, naming them, personally appeared and acknowledged the deed, and then continued: "And the said wife of said , having been by me examined, separate and apart," etc., acknowledged it, following the prescribed form. Held, (1) that the certificate was insufficient, and that the deed could not be read in evidence; and (2) that the certifying officer could not afterward amend the certificate. Merritt v. Yates (Ill.), 128.*

2. *Registry of — destruction of record.] Where a deed or mortgage is once duly recorded, it is thenceforth notice to all the world even though the record be totally destroyed. Shannon v. Hall (Ill.), 146.*

8. —.] A mortgagee recorded his mortgage. The records were afterward destroyed by fire, and a statute was passed, providing for their restoration, but the mortgagee took no steps to restore his record. Afterward the mortgagor conveyed to a *bona fide* purchaser without notice of the mortgage. *Held*, that the purchaser took the land subject to the mortgage. *Ib.*

Covenant in, for quiet enjoyment.] See COVENANT, 656.

Deficiency in land described in.] See VENDOR AND PURCHASER, 750.

DELIVERY.

See SALE, 619.

DIVIDENDS.

Right of State to appropriate.] See CONSTITUTIONAL LAW, 671.

On insolvents' estate, how made.] See INSOLVENCY, 754.

DEVISE.

To foreign corporation, when invalid.] See FOREIGN CORPORATION, 188.

To wife — effect of subsequent divorce.] See WILL, 807.

DIVORCE.

When presumed — subsequent marriage.] A husband and wife separated, and afterward the husband lived and cohabited with another woman whom he claimed to be and who was reputed to be his wife. Nine years after the wife, with knowledge of the fact, married again, and lived with the second husband until his death. In a proceeding for dower out of the estate of the second husband, *held*, that it was a presumption of law, (1) that the first marriage had been dissolved by a legal divorce before the second marriage, or (2) if the second marriage was originally void, that a subsequent marriage had taken place after the legal impediment was removed. *Blanchard v. Lambert* (Iowa), 245.

Effect of, on devise.] See WILL, 807.

DOG.

See ANIMALS.

"DUE PROCESS OF LAW."

See CONSTITUTIONAL LAW, 788.

ELECTION.

Oneness of — mandamus.] A canvassing board has no power to throw out returns of votes which are genuine and regular in form on the ground of fraud in the election; and if it does throw out such returns, may be compelled by mandamus to reassemble and make a correct canvass. *Lewis v. Commissioners* (Kan.), 275, and note, 279.

EMINENT DOMAIN.

By the United States.] The United States may exercise the right of eminent domain within a State; but a State cannot exercise it in behalf of the United States. *Darlington v. The United States* (Penn.), 766.

Power of State over private property for the public good.] See CONSTITUTIONAL LAW, 788.

EQUITY.

When will relieve from a contract based on an unlawful consideration.] See NEGOTIABLE INSTRUMENT, 117.

EQUITABLE CONVERSION.

See FOREIGN CORPORATION, 188.

ESTOPPEL.

1. *In pais — rule of, as to real estate — cannot operate to transfer title — statute of frauds.] Under the statute of frauds it is not permissible that an estoppel in pais should work a transfer of the legal title to land. Hayes v. Livingston (Mich.), 538.*
2. *—.] A mortgage on land was foreclosed and the land sold. It was then agreed between A, the mortgagor, and B, a second mortgagee, that B should buy up the title under the first mortgage foreclosure sale, and should then sell the land, and after deducting the amount of his own mortgage, and the sum paid for the title, pay over the balance of the proceeds to A. This arrangement was carried out and the land was sold by B to C to whom A represented that the title was in B; but it turned out that the foreclosure of the first mortgage was invalid, and that the title was still in A. Held, that he was not estopped from asserting it against C because, otherwise, it would be permitting an estoppel, resting in parol, to transfer the title contrary to the statute of frauds. Ib.*

EVIDENCE.

1. *Records in another suit — slander.] In an action of slander for charging plaintiff with the commission of a crime, the record of acquittal in a criminal prosecution for the same crime is not admissible either to prove the truth of the charge or to show malice. Corbley v. Wilson (Ill.), 98.*
2. *Opinions of non-professional witnesses as to testator's sanity.] Upon the issue of a testator's sanity, non-professional witnesses, although not subscribing witnesses to the will, may testify to their opinions in regard to the testator's sanity, founded upon their knowledge and observation of his appearance and conduct. Hardy v. Merrill (N. H.), 441.*
3. *Representations of insured as to health, in action to recover back money paid on a life insurance policy.] In an action to recover back money paid on a policy alleged to have been procured by the defendant on the life of one in feeble health, by means of fraud and deceit, held, that statements and complaints of the person insured, such as usually and naturally accompany and furnish evidence of a present existing pain or malady, were admissible in evidence; but that statements and representations of past feelings or bodily condition were not admissible. Asbury Life Insurance Company v. Warren (Mo.), 590.*

In actions for seduction.] See SEDUCTION, 98.

Of general reputation of plaintiff in slander suit.] See SLANDER, 236.

Of pecuniary ability in actions of slander.] See SLANDER, 808.

Parol, not admissible to rescind a written assignment.] See STATUTE OF FRAUDS, 712.

EXECUTION.

Issue of, after time limited by statute.] A statute provided that the execution on a judgment could issue "at any time within one year." *Held*, that an execution issued after the year was voidable but not void. *Morgan v. Hoans* (Ill.), 154.

Tender of amount of, discharges lien.] See TENDER, 612.

EXECUTOR.

1. *Carrying on business of decedent—liability of general estate.]* Where the executor of an estate, who is not authorized to do so, takes the personal assets of his testator, and uses them in carrying on the former trade and business of the testator for a series of years, for the purpose of making money to be used in paying the debts and supporting the family of the testator, consisting of a widow and minor children, and also for the purpose of keeping up the business for the minor sons when they should be old enough to take charge of it, and in so doing pays off all the debts of the testator, *held*, that the general assets of the testator in the hands of an administrator *de bonis non*, are not liable for money borrowed by the executor for, and used in carrying on such trade and business, though the executor acted in good faith. *Lucht v. Behrens* (Ohio), 878.

2. —.] The general estate, real and personal, of the testator, not embarked in such business, cannot be subjected to the liabilities incurred in its prosecution in the absence of clear and explicit authority conferred by the will, even though the executor acted in good faith *Ib.*

3. —.] When by the will all the estate, real and personal, is devised subject only to the payment of debts, the devisees, as well as the creditors, have an interest in the estate, that cannot be defeated or incumbered by debts contracted by the executor, not authorized by the will. *Ib.*

May be witness to will.] See WILL, 408.

EXECUTORS AND ADMINISTRATORS.

Sales by, who may conduct.] See ADMINISTRATOR, 144, and note, 145.

Allowance to widows.] See ADMINISTRATION, 149.

EXEMPTION.

From taxation.] See TAXATION.

EXEMPT PROPERTY.

Attachment of.] See BANKRUPTCY, 272.

EXPERT EVIDENCE.

See WILL, 441.

FELONY.

Compounding] See NEGOTIABLE INSTRUMENT, 117, and *note*, 121.

FOREIGN CORPORATIONS

1. *Devise to — conflict of laws.*] A corporation which cannot take real estate by devise in the State where it was incorporated cannot take by devise in another State *Starkweather v. American Bible Society* (Ill.), 133.
2. *Equitable conversion — cy pres.*] Where real estate is devised to a corporation which has no authority to take by devise a court of equity has no power to convert such real estate into money and direct the payment thereof to such corporation. *Ib.*
3. *Validity of conditions precedent to a license to transact business in a State — removal of causes to Federal courts — revocation of license.*] A State statute required foreign insurance companies, as a condition precedent to receiving a license to do business in the State, to agree not to remove into the United States courts any actions brought against them in the State court; and enacted that on violation of such agreement by an insurance company it should "be the imperative duty of the secretary of State to revoke its license." *Held*, (1) that the statute was constitutional; and (2) that the secretary might be compelled to revoke the license by mandamus at the relation of any person interested. *State ex rel. Drake v. Doyle* (Wia.), 692.

FORGED CHECK.

Recovery of money paid on.] See BANKS AND BANKING, 104.

FRAUDS.

See CONSPIRACY; STATUTE OF FRAUDS.

GARNISHEE.

See LIMITATION OF ACTIONS, 280.

GIFT.

Parol gift of land — when irrevocable in equity.] A father made a parol gift of land to his son, and the latter entered into possession and made valuable improvements in reliance upon such gift. *Held*, that the gift was irrevocable in equity, and a conveyance of the land to the son would be decreed. *Hardesty v. Richardson* (Md.), 57.

GRAND JURY.

1. *Venire — seal — amendment — remedial statute.*] It is a good plea in abatement to an indictment that it was found by a grand jury summoned by venire not bearing the seal of the court; and such defect is one which cannot be cured by amendment, nor can it be remedied by a special statute. *State v. Fleming* (Me.), 552.
2. *Interest of jurors.*] It is no ground for quashing an indictment for burglary in breaking into a bank, that two of the grand jurors by whom it was found were stockholders of the bank. *Rolland v. Commonwealth* (Penn.), 758.

Libel on.] See CONTEMPT, 158.

GUARDIAN.

Right of mother to appoint by will after divorce.] A decree of divorce was granted for the fault of the husband, and the custody of the child was given to the mother. *Held*, that the father had no further control of the child; and that a guardian appointed by the will of the mother was entitled to the guardianship of the child as against the father. *Wilkinson v. Deming* (Ill.), 192.

HIGHWAY.

1. *Nuisance in—steam engine is not.*] Plaintiff, while driving along a highway, was injured by reason of his horse taking fright at an engine mounted on wheels which defendant was moving along the same highway by means of steam power. In an action for damages the court charged the jury that "a party placing upon the highway any vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom." *Held*, error. *Macomber v. Nichols* (Mich.), 522, and *note*, 528.
2. *Means of locomotion — negligence.*] The users of horses and similar animals upon highways have no rights superior to the users of other means of locomotion; and if the use of the one result in injury to the user of the other, the right of action will depend on the question of negligence which is to be determined by the jury. *Ib.*
3. *Steam engine, not a nuisance.*] A steam engine as a means of locomotion in a highway is not necessarily a nuisance. *Ib.*

Negligence in not guarding dangerous street.] *See NEGLIGENCE*, 788.

HOMESTEAD.

Attachment of.] *See BANKRUPTCY*, 272.

ILLEGAL CONTRACT.

Agreement not to bid at assignee's sale.] *See CONTRACT*, 6.

Agreements to control trade.] *See CONTRACTS*, 171.

Limiting location of railroad stations.] *See RAILROAD*, 122.

IMPAIRING OBLIGATION OF CONTRACT.

See CONSTITUTIONAL LAW, 321, 491.

INDICTMENT.

Charging different offenses — verdict.] *See VERDICT*, 606.

Sufficiency of, for conspiracy.] *See CONSPIRACY*, 719.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS.

INDORSER.

Of negotiable instrument cannot impeach consideration.] *See WITNESS*, 91.

INFANT.

Guardian for.] *See GUARDIAN*, 192.

When subject of murder.] *See CRIMINAL LAW*, 267.

Insurable interest in life of parent.] See INSURANCE, 180, 741.

Committal of, to industrial school.] See CONSTITUTIONAL LAW, 703.

INJUNCTION.

Will not be granted to restrain collection of tax to pay irregular bonds.] See MUNICIPAL BONDS, 141.

At whose suit granted to restrain tax to pay void bonds.] See TAXATION, 264.

To restrain unlawful use of public school-house.] See PUBLIC SCHOOL-HOUSE, 268.

INSOLVENCY.

Dividend on insolvent's estate — how made.] A, the maker, and B, the indorser, of a promissory note, made assignments for the benefit of their respective creditors. Each estate paid a dividend. Held, that the holder of the note was entitled to a dividend upon the whole amount of the note from each estate. Miller's Estate (Penn.), 754.

INSURANCE.

• FIRE.

1. *Description of location of insured property — warranty — "contained in."]*

A policy of insurance was issued on a carriage described as "contained in a frame barn." The carriage was destroyed by fire while at a carriage shop undergoing repairs. *Held*, that the loss was covered by the policy. *McCluer v. Girard Ins Co.* (Iowa), 249, and *note*, 253.

2. *Rule of construction.] Policies of insurance, like other contracts, are to receive a reasonable construction, so as not to defeat the intention of the parties. West v. Citizens' Ins. Co. (Ohio), 294.*

3. *Condition against assigning policy — assignment to partner.] When the policy contains a provision that the assignment of the same, or any interest therein, without the assent of the company indorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy, does not avoid it. Ib.*

4. *Damages.] In case of loss after such sale and transfer, the remaining partners, being the real parties in interest, should sue on the policy, and in such action they are not limited in the amount of recovery, to their interest in the partnership goods before such sale and transfer, but can recover for the whole loss. Ib.*

5. *Condition avoiding policy — "levy on" property.] A policy of insurance on a building was conditioned to cease at and from the time that the property "shall be levied on or taken into possession or custody under any proceeding in law or equity." A mechanics' lien was filed against the building, judgment rendered and execution issued thereon, and the property was advertised to be sold. Before the day of sale the building was burnt. *Held*, that the levy did not terminate the risk, and that the insurers were liable. *Insurance Company v. O'Maley* (Penn.), 769.*

6. —.] *Semble*, that the condition avoiding the policy in case the property "shall be levied on or taken into possession," had special reference to personal property. *Ib.*

LIFE.

7. *Insurable interest of son in life of father.*] A son has an insurable interest in the life of his father especially where the son is liable under the poor law for the support of the father. *Reserve Mutual Insurance Company v. Kane* (Penn.), 741.
8. —.] The relation of father and son does not give the son an insurable interest in the life of the father, unless the son has a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father. *Guardian Mutual Life Insurance Co. v. Hogan* (Ill.), 180.
9. *Excessive insurance.*] Though a person may have some insurable interest in the life of another as creditor or otherwise, yet if he cause that life to be insured for a sum largely in excess of any loss that he can possibly suffer by the death of such person, the presumption is that the policy is a wager policy, and invalid. *Ib.*
10. "For benefit of wife and children" — *distribution of proceeds.*] A man procured a policy of insurance on his life "for the benefit of his wife and children," and payable "to the said assured, their executors," etc. *Held*, that the money assured was to be distributed among the beneficiaries equally, and not according to the statute of distribution. *Cragin v. Cragin* (Mo.), 588.

Evidence in action to recover back money paid on policy.] See EVIDENCE, 590.

INSURABLE INTEREST.

See INSURANCE, 180, 741.

INTEREST.

Usurious.] See USURY.

Non-payment of, dishonors promissory note.] See NEGOTIABLE INSTRUMENT, 728.

JUDGMENT.

Of a Confederate court—effect of, in another State—jurisdiction—authority of attorney.] An action was brought in Arkansas in 1857 against a citizen of Ohio, who appeared therein by an attorney duly authorized and filed his plea; in 1861, after the State had seceded, the action was tried, the same attorney defending it, and judgment rendered for the plaintiff. In an action on such judgment brought in Ohio, *held*, (1) that want of jurisdiction in the Arkansas court could be shown; (2) that the judgment was void as the judgment of a court created by unlawful authority; (3) that the attorney could not confer jurisdiction by consent. *Pennywit v. Foote* (Ohio), 840.

JUDICIAL SALES.

Who may conduct.] See ADMINISTRATOR, 144, and note, 145.

JURISDICTION.

1. *Of admiralty and maritime causes — arising on navigable rivers.*] The Ohio river being a navigable river of the United States, not connected with the lakes, under the judiciary act of 1789, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction arising thereon is vested in the District Courts of the United States, saving to suitors, however, in all cases, a common-law remedy, where the common law is competent to give it. *Steamer Petrel v. Dumont* (Ohio), 897.
2. *What are maritime contracts.*] Contracts for repairs or supplies furnished to a boat or vessel at her home port are maritime contracts, and, therefore, come within the admiralty jurisdiction of the United States District Courts. But contracts for boat or shipbuilding are not maritime contracts, and, therefore, do not fall within that jurisdiction. *Ib.*
3. *Test of jurisdiction.*] The test of admiralty jurisdiction under the act of 1789 is the nature of the claim on which the suit is founded, and is not the form of remedy resorted to. When the claim is maritime, it comes within that jurisdiction exclusively, excepting only the right of suitors to pursue common law remedies, or what is equivalent thereto in other courts. *Ib.*
4. *Proceeding under the State law.*] A suit by a proceeding *in rem* against a boat or other craft, under the watercraft law of this State, for the breach of a maritime contract, is not a common-law remedy, within the meaning of the saving to suitors of such remedies by the act of 1789. *Ib.*
5. —.] A suit *in rem*, under the watercraft law of the State, on a claim for repairs or supplies to a boat or craft navigating the Ohio river, is not a mere proceeding to enforce a lien, but it is also a civil action, founded on a contract; and when the claim is a maritime contract, the proceeding *in rem* cannot be resorted to in the State court, for upon such contracts that remedy is, by the Constitution and laws of the United States, vested exclusively in the United States District Court. *Ib.*
6. *Contracts for supplies or repairs in home port.*] No maritime lien arises on a contract for repairs or supplies furnished to a boat or vessel in her home port; therefore, it is competent for the States, in such cases, to create liens therefor, and to provide remedies for their enforcement not inconsistent with the exclusive jurisdiction of the admiralty courts. *Ib.*
7. —.] The lien given by the watercraft law of the State on contracts for repairs or supplies to a domestic boat or craft, engaged in inter-State commerce on the Ohio river, cannot be enforced by a proceeding *in rem* against the boat or craft in the State court; for that proceeding, in such cases, is within the exclusive jurisdiction of the United States District Court. *Ib.*

State courts will not enforce bankruptcy law.] See BANKRUPTCY, 685.

When State court will hold adjudication void.] See BANKRUPTCY, 194.

JUROR.

What expression of opinion disqualifies.] A person who has expressed an opinion that one undergoing imprisonment for a criminal offense has

been sufficiently punished, and who has signed a petition for his pardon, is not a competent juror upon the trial of a civil action against the prisoner founded upon the same charge. *Asbury Life Ins. Co. v. Warren* (Me.), 590.

See GRAND JURY.

JUSTIFICATION.

See SLANDER.

LANDLORD AND TENANT,

Lien of landlord for rent.] One who purchases of a tenant property, other than crops, and removes the same from the leased premises, takes it freed from the lien of the landlord for rent, even if he knew, at the time of the purchase, that the tenant owed rent and that the landlord was about to distrain therefor. *Hadden v. Knickerbocker* (Ill.), 80.

LANDS.

Sale of.] *See* COVENANT; VENDOR AND PURCHASER.

LEASE.

Condition in, for lien on future crops.] *See* MORTGAGE, 644, and note.

LEGAL REPRESENTATIVES.

See TRUST, 85.

LEX LOCI CONTRACTUS.

See MARRIAGE, 678, 688.

LIBEL.

On grand jury.] *See* CONTEMPT, 158.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

Acknowledgment to a stranger — garnishes.] An acknowledgment of a debt to a stranger will not avoid the running of the statute of limitations; and, therefore, where defendant was summoned as garnishee of plaintiff in an action brought by a third party, and by his answer admitted that he owed money to plaintiff, *held*, that plaintiff could not, in an action by him against defendant, avail himself of this admission. *Sibert v. Wilder* (Kan.), 290.

LIS PENDENS.

See ACTION, 370.

LORD'S DAY.

See SUNDAY.

MALICIOUS PROSECUTION.

Liability for procuring one to be indicted on charges not constituting a crime.] A falsely and maliciously stated to the prosecuting attorney that B had

committed certain acts which the prosecuting attorney decided to constitute a crime, and thereupon caused B to be indicted upon A's testimony. B was acquitted upon the ground that the facts alleged did not constitute the crime charged. *Held*, that A was liable to B for malicious prosecution. *Dennis v. Ryan* (N. Y.), 685.

MANDAMUS.

To canvassing board.] See ELECTION, 275, note, 279.

To confer right of sepulture.] See CEMETERY, 743.

MARITIME CONTRACTS.

See JURISDICTION, 897.

MARRIAGE.

1. *Effect of State statutes, as to.*] By the law of North Carolina, marriages between negroes and white persons were unlawful. A white woman left the State in order to be married in another State, to a negro resident thereof, and not intending to return. She was so married and afterward did return with her husband. *Held*, that the marriage was valid in North Carolina. *State v. Ross* (N. C.), 678.

2. *State statutes as to — leaving State to avoid — lex loci contractus.*] A negro and a white person, between whom marriage was prohibited in North Carolina, left the State for the purpose of avoiding the law, and with intent to return, and were married in another State where such marriages were lawful. *Held*, that the marriage was not valid in North Carolina. *State v. Kennedy* (N. C.), 683.

Evidence of offer of, not admissible in action for seduction.] See SEDUCTION, 98.

Will — revocation of, by.] See WILL, 164.

Presumption as to validity of.] See DIVORCE, 245.

Second marriage.] See BIGAMY, 581.

MASTER AND SERVANT.

Action for enticing away servant — damages.] A master may maintain an action against any one who knowingly and willfully entices away his servant; and may recover exemplary damages therefor. *Bisby v. Dunlap* (N. H.), 475, and note, 485.

Liability of servant who burns his master's house by procurement of master.] See ARSON, 569.

MISTAKE.

See PAYMENT, 557.

MONEY HAD AND RECEIVED.

Recovery of money paid on forged check.] See BANKS AND BANKING, 104.

Money paid on illegal assessment.] See TAXATION, 512.

MONOPOLIES.

See MUNICIPAL CORPORATIONS, 261.

MORTGAGE.

Of property not acquired — condition in lease, for lien on crops to be grown.]

A lease provided that the lessor should have "a lien as security, for the payment of the rent on all goods, implements, stock, fixtures, tools and other personal property, which may be put on said premises, said lien to be enforced on the non-payment of rent," by taking and sale as in case of a chattel mortgage. Default being made, the lessor seized farm produce and stock and sold it, and the lessee brought an action for conversion. *Held*, that the provision was in substance a chattel mortgage; that, as the property was not then in existence or acquired, it conveyed no present legal title, but was a valid license to enter and seize the property if in existence on default, and that, after such entry and seizure, the title vested in the lessor. *Held*, also, that in equity the lien would attach and bind the property as soon as acquired. *McCaffrey v. Woodin* (N. Y.), 644, and *note*.

Destruction of record — effect of.] See DEED, 146.

Plea of usury to.] See USURY, 287.

MUNICIPAL BONDS.

1. *Defective execution — restraining tax for.]* A county was duly authorized by statute to issue bonds to be signed by certain officers, and countersigned by the treasurer. The bonds were issued without being so countersigned. *Held*, that a court of equity would not enjoin the collection of a tax levied for their payment. *Melvin v. Lisenby* (Ill.), 141.

2. *Over-issue — to what extent valid.]* Municipal bonds issued to an amount beyond that limited by the Constitution and the statutes, but otherwise lawful, were transferred to *bona fide* holders for value. *Held*, (1) that the bonds issued in excess of the limit were void; (2) that the bonds were valid to the amount and (they all being issued as a part of one transaction) a recovery may be had on any bond for such proportion of its face as the maximum issue authorized by the Constitution bears to the whole issue, and (3) that a tax levied to pay the bonds was valid only for the amount authorized. *McPherson v. Foster* (Iowa), 215.

Void — parties to action to enjoin tax for.] See TAXATION, 264.

MUNICIPAL CORPORATION.

1. *Right of, to tax its own bonds.]* The stock of a municipal corporation, payable and transferable only at the treasury of the corporation, has its *situs* within the corporation, and the corporation may lawfully tax it whether held by a non-resident or a resident. *Jenkins v. Charleston* (S. C.), 14.

2. — *payment of tax how enforced.]* Where a city taxes its own stock, it may enforce payment by deducting the amount of the tax from interest due on the stock. *It.*

3. *Powers — right to grant monopolies.]* A city was authorized by its charter to "license, tax and regulate" omnibuses. *Held*, that it had no power to grant an exclusive right to run omnibuses within its limits. *Logan v. Pynes* (Iowa), 261.

4. *Liabilities for injuries occasioned by a sewer.*] A city constructed a sewer so unskillfully that it became obstructed and caused water to set back on to plaintiff's premises to his injury. *Held*, that the city was liable. *Ross v. Portsmouth* (N. H.), 464.
 5. —.] In maintaining a public sewer a city is bound to use the same degree of care and prudence as would be required of an individual. *Ib*.
 6. —.] Although a municipal corporation be not required by law to build sewers, yet if it have authority to build them, and voluntarily undertake to do so, it will be liable for any injury occasioned by its negligence or misfeasance either in building or maintaining them. *Ib*.
 7. *When not liable for errors in plan of improvements.*] Municipal corporations are not liable for injuries resulting from the *plan* of a public work, as distinguished from its mode of execution, unless such plan must necessarily result in a direct invasion of private property. *Detroit v. Beckman* (Mich.), 507, and *note*, 510.
 8. —.] Plaintiff's intestate, in driving through defendant's streets, ran off the end of a culvert and was killed. In an action for damages on the ground that defendant was negligent in building a culvert so short as to render the street dangerous, *held*, that the defendant was not liable, as the defect was in the plan of the culvert. *Ib*.
 9. *Liability of, for failure of water-works—damages.*] A municipal corporation laid water-pipes through the city which any one might connect with his house, and use on payment of a certain water-rent. The pipe with which plaintiff's house was connected was so carelessly laid that it froze and burst, thereby depriving plaintiff's tenants of water, on which ground they abandoned the premises. *Held*, that plaintiff could recover of the city the water-rent paid, while deprived of the use of the water, but not for damages in being deprived of the water, or for loss of tenants. *Smith v. Philadelphia* (Penn.), 731.
- Negligence of, in not guarding dangerous street.*] See NEGLIGENCE, 783.
- Assessments for betterments—impairing obligation of contracts.*] See CONSTITUTIONAL LAW, 321.
- *rule as to.*] See ASSESSMENTS FOR LOCAL IMPROVEMENTS, 760.

MURDER.

When infant subject of.] See CRIMINAL LAW, 257.

NATIONAL BANK.

1. *Increase of capital stock—taxation of increased stock.*] Where a national bank voted to increase its capital stock, and the requisite number of new shares were subscribed and paid for before the 1st January, 1872, and a semi-annual dividend, declared as of that day, was paid upon the new shares, as well as the old, but such increase of capital was not approved by the comptroller of the currency, nor his certificate issued until the 5th January, 1872: *Held*, that such new shares were not the subjects of

taxation under an ordinance imposing a tax on bank shares "in the hands of the tax payers on the 1st January, 1872." *Charleston v. People's National Bank* (S. C.), 1.

2. *Capital — how increased.*] There can be no increase of the capital of a national bank until the comptroller of the currency approves thereof and issues his certificate, as provided by section 18 of the Act of Congress providing for the organization of national banks. *Ib.*
3. *Power of, to take collateral security — deposits for safe-keeping — measure of damages on loss of bonds.*] A national bank received from a customer bonds as collateral security for a debt then existing, and for future obligations. Afterward, and after the customer had paid his indebtedness, the bonds were stolen from the bank. *Held*, (1) that the bank was not a gratuitous bailee of such bonds; (2) that it had power to take the bonds as security for existing or future loans; (3) that it was liable if it failed to exercise ordinary care and diligence in keeping the bonds; and (4) that the measure of damage was the value of the bonds when stolen and not when demand of them was made. *Third National Bank v. Boyd* (Md.), 85.
4. *Sale of stock by pledgee to avoid personal liability.*] Stock in a national bank was pledged to secure a debt, with power to the pledgee to sell it on default of payment. *Held*, that a sale by him pursuant to the power was not voidable as a fraud on creditors of the bank, though he sold because he believed the bank insolvent, and in order to escape personal liability as a stockholder. *Magruder v. Colston* (Md.), 47.
5. *Liability of pledgee of stock.*] Persons who hold stock of a national bank in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the national banking act, stockholders, and so long as they thus hold the stock in pledge are responsible to the creditors of the bank in proportion to the amount so held. *Ib.*
6. *Taxation of surplus capital.*] The surplus capital of national banks, in excess of the amount they are required by law to keep on hand, is taxable by the States in which the banks are located. *First National Bank v. Peterborough* (N. H.), 416, and *note*, 480.
7. *Taxation of, by States.*] The act of Congress of June, 1864, in relation to the taxation of national banks does not curtail State power as to the subject of taxation, or cut off the right to exempt certain kinds of property if a legislature chooses to do so. Its only object is to prevent unfriendly discrimination against national banks. *Adams v. Mayor of Nashville* (U. S. Sup.), *note*, 480.

NAVIGABLE RIVERS.

See JURISDICTION, 397.

NEGLIGENCE.

1. *Duty of railroad company toward one unlawfully walking on its track.*] Plaintiff, while passing, for his own convenience, over a portion of defendant's railroad line, where the public were in the habit of passing and re-passing, was injured through the alleged negligence of defendant. *Held*,

that the right of way was the exclusive property of the defendant; that the fact that the defendant had passively permitted others to use it as a foot way gave plaintiff no right thereon, and imposed no duty on the defendant to provide safe-guards against the dangers incident to such use, and that the defendant would only be liable for willful injury or gross negligence. *Illinois Central R.R. Co. v. Godfrey* (Ill.), 112.

2. *Of city in not guarding a dangerous street — proximate and remote cause.*] Plaintiff's horse, while being driven on defendant's road, was frightened by a locomotive on an adjacent railroad, became unmanageable, and fell from the road, along which was no barrier, down a precipice and was killed. The jury found that the city was negligent in not placing barriers along the roadside at the point. *Held*, that the defendant was liable for the damage. *Hey v. Philadelphia* (Penn.), 733.

3. *Contributory negligence — burden of proof.*] In an action to recover for injuries caused by defendant's negligence, the burden is not on the plaintiff to prove that he was in the exercise of due care, but if the defendant rests his defense on the contributory negligence of the plaintiff, the burden is on him to prove such negligence. *Hoyt v. Hudson* (Wis.), 714.

What is, on part of bank in preserving securities.] See NATIONAL BANK, 85.

In construction of sewers.] See MUNICIPAL CORPORATION, 464.

Liability of cities for.] See MUNICIPAL CORPORATIONS.

NEGOTIABLE INSTRUMENT.

1. *Negotiable note of corporation—effect of seal.*] The promissory note of a corporation, negotiable in form, is a negotiable promissory note, notwithstanding it bears the seal of the corporation. *Central National Bank v. Charlotte R. R. Co.* (S. C.), 12.

2. *Consideration — agreement to discontinue criminal prosecution.*] A promissory note, and a mortgage to secure it, were given in consideration that a prosecution for a felony should be discontinued. The mortgage was afterward foreclosed by a proceeding in which a want of consideration could not be pleaded as a defense, and the property was sold to an agent of the mortgagee. *Held*, (1) that the consideration of the note and mortgage was illegal and void; and (2) that a court of equity would cancel the note and mortgage, and set aside the foreclosure and the sale. *Henderson v. Palmer* (Ill.), 117, and note, 121.

3. *Fraud between maker and surety — when payee not affected by.*] In an action by the payee of a promissory note against the surety thereon, the latter interposed the defense that he was induced to sign the note by the fraud and circumvention of the maker. *Held*, not a good defense without proof that the payee participated in or was cognizant of the fraud. *Anderson v. Warne* (Ill.), 83.

4. *Indorser of, cannot impeach — witness.*] The indorser of a negotiable paper is not a competent witness to impeach its consideration. *Dowdy v. Wariner* (Ill.), 91, and note, 93.

5. *Indorsement — limitation of special indorsement.*] The payee of a negotiable note wrote and signed his name to the following words upon the

back thereof: "I this day sold and delivered to Catherine M. Adams the within note." *Held*, that he was liable as an ordinary indorser. *Adams v. Blothen* (Me.), 547.

6. *Sunday—note executed on.*] A promissory note signed on Sunday, but not delivered until Monday, is valid. *King v. Fleming* (Ill.), 181.
7. *When agent liable as principal.*] The trustees of a church gave a promissory note for a church debt, describing themselves in the body of the note as "trustees of" the church, and after their signatures appending the word "trustees." *Held*, that they were individually liable on the note. *Powers v. Briggs* (Ill.), 175, and *note*, 179.
8. *Alteration of—when agents liable as principals.*] A note, purporting by its terms to be the personal promise of the makers, was signed by A, B, & C, "as trustees of the First Universalist Society;" a blank being left above these words for the signature of D, a fourth trustee; and the note was delivered to the payee to obtain that signature, which he did after tearing off, without D's knowledge, the descriptive words. *Held*, that the makers would have been personally liable on the note, even had the descriptive words not been torn off; and that, therefore, the note had not been materially altered when D signed it, and that he was liable on it. *Burlingame v. Brewster* (Ill.), 177, and *note*, 179.
9. *Alteration of—when not material—innocent alteration.*] The payee of a note, desiring to transfer it, and being ignorant of the appropriate method, erased his own name and inserted that of the transferee; but subsequently and before delivery restored the instrument to its original form and transferred it by indorsement. *Held*, that the alteration was not material. *Horst v. Wagner* (Iowa), 255.
10. *Promissory note—dishonored by non-payment of interest.*] A promissory note, bearing interest payable annually, was indorsed before maturity, but after an installment of interest was due and unpaid. *Held*, that the note was dishonored and that the indorsee took it subject to all equities between the original parties. *Hart v. Stickney* (Wis.), 728.

Bank checks. See BANKS AND BANKING, 185.

Forged check—recovery of money paid on.] See BANKS AND BANKING, 104.

NUISANCE.

Steam engine in highway.] See HIGHWAY, 522.

ONUS PROBANDI.

Of contributory negligence.] See NEGLIGENCE, 714.

PARDON.

After "conviction"—pending an appeal.] The governor was authorized to grant pardons "after conviction." *Held*, that a pardon after verdict and judgment but pending an appeal taken by the prisoner was valid. *State v. Alexander* (N. C.), 675.

PARENT AND CHILD.

Mother may appoint guardian by will after divorce.] See GUARDIAN, 122.

Insurable interest of son in life of father.] See INSURANCE, 180, 741.

Validity of statute requiring pauper children to be committed to industrial schools.] See CONSTITUTIONAL LAW, 702.

PAROL EVIDENCE.

Not admissible to rescind a written assignment.] See STATUTE OF FRAUDS.

PARTNERSHIP.

1. *What constitutes.]* The liability of one partner for the contracts of another, when not estopped from denying the liability, is founded on the relation they sustain of being each principal and agent in the joint business. That relation is, therefore, the true test of a partnership, and the liability rests on the ground that it was incurred on the express or implied authority of the party sought to be charged. *Harvey v. Childs* (Ohio), 887.

2. *Participation in profits.]* Participation in the profits of a business, though cogent evidence of a partnership, is not necessarily decisive of the question. The evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the other. *Ib.*

3. *—.]* A agreed to advance money to B from time to time up to a certain amount to enable B to carry on business; and B agreed to pay interest to A on the average balance advanced, and also to divide the profits after deducting a fixed sum for expenses; but A was not to bear any losses. *Held*, that A and B were not partners as to third persons. *Smith v. Knight* (Ill.), 94.

Sale from one partner to another.] See INSURANCE, 294.

PARTY.

To action to restrain unlawful municipal taxation.] See TAXATION, 264.

To action to restrain unlawful use of public school-houses.] See PUBLIC SCHOOL-HOUSE, 268.

PATENTS.

Statute restricting sale of, void.] A State statute requiring vendors of patent rights to procure a certificate from the county clerk, and provided that every written obligation, the consideration of which was a patent right, should contain the words "given for a patent right," and that such obligation should be subject to all defenses as if owned by the promisee, *held*, unconstitutional and void as an attempt to regulate and control by State legislation a matter of which Congress has sole jurisdiction. *Heldida v. Hunt* (Ill.), 63, and *note*, 67.

PAUPERS.

Commitment of pauper children to industrial schools.] See CONSTITUTIONAL LAW, 702.

PAYMENT.

In worthless negotiable paper — mutual mistake.] A negotiable town order transferred by a debtor to his creditor, for the purpose of paying his debt

and received for that purpose — both parties acting in good faith — will not operate as a payment, if, at the time, it was worthless for the reason that the drawers and acceptor had no authority to make or accept it. *Hussey v. Sibley* (Me.), 557.

POLICE POWER.

Limitation of — restrictions on cemetery corporations.] See CONSTITUTIONAL LAW, 71.

POWER.

*Exercise of, by will — assets — fund due from charitable society.] By the rules of a benevolent society, a sum was payable upon the death of a member, to his widow, children, or such persons to whom he might have disposed of the same by will or assignment; and if there should be no widow or children, and no disposition by will or assignment, the fund should go to the permanent fund of the society. A member died unmarried and without issue, and by his will gave the "entire residue" of his "estate," after payment of debts and funeral expenses, to his three sisters. *Held*: (1) that the fund due from the society was not assets recoverable by his administrator or executor, but only the subject of a power; and (2) that the will was not an exercise of the power, and, therefore, the fund went to the society. *Maryland Mutual Benevolent Society v. Glendison* (Md.), 52. *By whom exercised.] See TRUST, 85.**

PRESUMPTION.

As to validity of marriage.] See DIVORCE, 245.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PROXIMATE AND REMOTE CAUSE.

See NEGLIGENCE.

PUBLIC SALE.

Agreement not to bid at.] See CONTRACT, 6.

PUBLIC POLICY.

Agreement not to bid at assignee's sale void.] See CONTRACT, 6.

Combinations to control trade.] See CONTRACT, 171.

PUBLIC SCHOOL-HOUSE.

1. *Unlawful use of.] The use of a public school-house for other than school purposes is unlawful and may be enjoined at the suit of any one injured thereby. Spencer v. Joint School District* (Kan.), 268.
2. *Injunction to restrain — party.] The petition for an injunction to restrain the use of a public school-house for other than school purposes, alleged that the plaintiff was "a resident of the school district and a tax payer therein, that his children attended school in the said school-house, and that, by the improper use of the building complained of, the books of his*

children were torn, soiled, carried away, lost and misplaced," etc. *Held*, that plaintiff showed such a personal and private injury and interest as would enable him to maintain the action. *Id.*

QUIET ENJOYMENT.

See COVENANT, 656.

RAILROAD.

1. *Agreement limiting location of stations — illegal contract.*] Land was conveyed to a railroad company on condition that it should build no stations within three miles of a certain place. *Held*, that the condition was against public policy and void, and that the vendor was not entitled to relief for a breach thereof. *St. Louis, etc., R. R. Co. v. Mathers* (Ill.), 122.
2. *Right of way — diversion of stream — assessment of damages.*] An assessment of damages for land taken for a railroad does not cover damages occasioned to the owner by the diversion of a natural stream of water, although such diversion is necessary to the proper construction of the road-bed. *Stodghill v. Chicago, etc., R. R. Co.* (Iowa), 211.

Duty toward trespasser.] *See* NEGLIGENCE, 112.

Bills of lading — wrongful issue of, by agent.] *See* CARRIER, 26, 602.

Failure to transport goods.] *See* DAMAGES.

RATIFICATION.

Of contract made on Sunday.] *See* SUNDAY, 181.

REAL PROPERTY.

Parol gift of.] *See* GIFT, 57.

REGISTRY.

Of deeds and mortgages — destruction of.] *See* DEED, 146.

REMEDIAL STATUTE.

See GRAND JURY, 552.

REMOVAL OF CAUSES.

1. *To United States courts — final disposition of cause.*] Where a decree of the trial court is reversed on appeal and the cause remanded with direction to dismiss the bill, the cause is finally disposed of, and it cannot, thereafter, be removed into the Circuit Court of the United States. *Boggs v. Willard* (Ill.), 77, and *note*, 79.
2. *When may be had under act of 1875.*] After a cause has been once tried in a State court and a verdict rendered, it cannot be removed into the United States Circuit Court, although the verdict may have been set aside for error and a new trial granted. *Chandler v. Oos* (N. H.), 487.
3. *Section 689, United States Rev. Stat. not repealed.*] Section 689 of the United States Revised Statutes, providing for the removal of causes at any time before trial, from State to United States courts, on the ground of prejudice or local influence, is not repealed by the act of Congress of March 3, 1875. *Barber v. St. Louis, etc., R. R. Co.* (Iowa), 248.

Condition against — power of State to revoke license of foreign corporation.] See FOREIGN CORPORATIONS, 692.

RENT.

Lien of landlord for.] See LANDLORD AND TENANT, 80.

REPLEVIN.

Measure of damage.] In an action of replevin, where the property in controversy has a usable value, the value of the use of such property during the time of its wrongful detention may be recovered as proper damages. Yandle v. Kingsbury (Kan.), 282, and note, 284.

RESTRAINT OF TRADE.

Action for breach of contract.] See DAMAGES, 581.

RETROSPECTIVE LAW.

What is.] See CONSTITUTIONAL LAW, 491.

REVOCATION.

Of will by marriage.] See WILL, 164.

ROAD.

See HIGHWAY.

SABBATH.

See SUNDAY.

SAFE DEPOSITS.

Right of national bank to receive.] See NATIONAL BANKS, 85.

SALE.

Statute of frauds — "receipt and acceptance" — when title passes.] Defendants verbally ordered lumber of plaintiffs, to be taken from certain lots designated by defendants in plaintiffs' yard, and to be cut by plaintiffs into sizes required by defendants and placed on plaintiffs' dock, and notice to be given to defendants, who agreed thereupon to take it. Plaintiffs filled the order, placed the lumber on the dock and gave notice to defendants, as agreed, but before they removed it it was accidentally burned. Held, that the contract was one of sale under the statute of frauds; that there was no receipt and acceptance of the lumber by defendants; that the title thereto had not passed, and that defendants were not liable for the price agreed to be paid. Cooke v. Millard (N. Y.), 619.

By administrator, who may conduct.] See ADMINISTRATOR, 144, and note, 145.

Of land — deficiency.] See VENDOR AND PURCHASER, 750.

SCHOOL.

Of religious sect — exemption from.] See TAXATION, 504.

See PUBLIC SCHOOL-HOUSE, 268.

SEAL.

Effect of, on note of corporation.] See CORPORATION, 12.

Necessary to venire.] See GRAND JURY, 552.

SEDUCTION.

Evidence—abortion—offer of marriage.] In an action for seduction of the plaintiff's daughter and servant, evidence that the defendant procured an abortion to be made is admissible in aggravation of damages, if such fact is charged in the declaration; and evidence of an offer of marriage by the defendant, after action brought, is not admissible in mitigation. *White v. Murland* (Ill.), 100.

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

Town cannot set off debt.] See TAXATION, 482.

See ASSIGNMENT, 812.

SEWERS.

Liability for.] See MUNICIPAL CORPORATION, 464.

SHERIFF.

Tender to, discharges lien of execution.] See TENDER, 612.

SLANDER.

1. *Imputing drunkenness to a clergyman.]* Words, charging a clergyman with drunkenness, when spoken of and concerning him in his office or calling, are actionable *per se*. *Häyner v. Coraden* (Ohio), 308.
2. *Damages—evidence of pecuniary ability.]* In an action where punitive damages may be allowed, evidence of the defendant's pecuniary ability is admissible. *Ib.*
3. *Exemplary damages.]* It is not error to refuse to charge the jury, that if the defendant without reasonable cause believed the charge to be true, they could not award exemplary damages, where there is evidence tending to show that he uttered the words in a wanton and reckless manner. *Ib.*
4. *Words imputing trespass on real estate.]* The words "A stole windows from B's house" are not in their ordinary sense actionable as imputing either larceny or an act of malicious trespass upon real estate. *Wing v. Wing* (Me.), 548.
5. *Justification.]* In an action for slander in calling a woman "a whore," proof that she had sexual intercourse with her affianced husband before marriage does not amount to a justification. *Sheehy v. Oakey* (Iowa), 288, and note, 289.
6. *Evidence of reputation.]* In an action for slander in calling a woman "a whore," there was evidence that plaintiff had sexual intercourse with her affianced husband before marriage, and also tending to show that she made

an indecent exposure of her person, and otherwise conducted herself in a licentious manner *Held*, that evidence was admissible to show that plaintiff's general reputation for chastity was good. *Ib*

Evidence in action for—records in another suit.] See EVIDENCE, 98.

STATUTE.

Impeachment of, by consent of parties.] The court will not act upon the admission of parties that a statute has not been passed in the manner required by the Constitution. Such fact must be shown either by the printed journals or the certificate of the secretary of State. *Hoppel v. Brathauer* (Ill.), 70.

STATUTE OF FRAUDS.

1. *Verbal promise of indemnity to a surety.*] A promise of indemnity by one of a party to an obligation to induce another to become surety thereon, being a promise to answer for the default of another person, if not in writing, is void under the statute of frauds. *Ferrell v. Maxwell* (Ohio), 898.
2. —.] But if a surety on an obligation, upon his promise of indemnity, procures another to become surety with him on the same instrument, the promise is not within the statute, for the indemnity promised is to secure his own default. *Ib*.
3. —.] A surety on an administration bond, by his agreement of indemnity, induced another to sign the same bond as surety with him. *Held*, that the agreement, though not in writing, was valid and binding as between the parties to the agreement. *Ib*.
4. *Execution of memorandum after breach.*] A written memorandum of a verbal contract was made after a breach of the contract, but before action for the breach. It was antedated as an original contract of the date of the verbal contract first made. *Held*, that the memorandum was sufficient to satisfy the statute of frauds. *Bird v. Munroe* (Me.), 571.
5. *Verbal agreement to rescind a written assignment.*] Plaintiff made an absolute written assignment of his interest in a land contract. *Held*, that parol evidence was not admissible to prove that the assignment was afterward rescinded or agreed to be held as security for debts due from the assignor to the assignee. *Richardson v. Johnson* (Wis.), 712.

Estoppel in pais cannot operate to transfer title.] See ESTOPPEL, 532.

See SALE.

STOCK.

Of municipal corporations—taxation of.] See MUNICIPAL CORPORATIONS, 14.

Subscription to—when void conditional subscription.] See CORPORATION, 199.

Bailment of.] See BAILMENT, 328.

STOCKHOLDER.

In national bank, when pledgee of stock liable as.] See NATIONAL BANK, 47.

STREET.

See HIGHWAY.

SUBSCRIPTION.

To corporate stock—conditional.] See CORPORATION, 199.

SUNDAY.

1. *Note executed on—delivery.]* A promissory note was signed on Sunday, but not delivered until Monday. *Held*, valid. *King v. Fleming* (Ill.), 131.
2. *Action for money loaned on.]* An action cannot be maintained to recover money loaned on the Lord's day. *Meador v. White* (Me.), 551.

SURETIES.

Contribution.] Plaintiff and defendant were sureties upon a promissory note which the maker failed to pay at maturity. Action thereon having been brought, plaintiff paid the note before judgment and brought this action for contribution. *Held*, that he was entitled to recover although there existed a good defense to the note, he being ignorant of the fact and having acted in good faith and without negligence. *Hickborn v. Fletcher* (Me.), 563.

Verbal promise to indemnify.] See STATUTE OF FRAUDS, 393.

To negotiable instrument—when not discharged by fraud of makers.] See NEGOTIABLE INSTRUMENT.

TAXATION.

1. *To pay void municipal bonds—right of State to maintain action to restrain collection of.]* An action does not lie in the name of the State at the relation of the attorney-general for an injunction to restrain the collection of a tax levied to pay void bonds issued by a public (school district) corporation. *State v. McLaughlin* (Kan.), 264.
2. *Exemption from—constitutional limitations.]* The Constitution of a State provided that "such property as the general assembly may deem necessary for schools, religious and charitable purposes may be exempt from taxation." *Held*, that only such property could be exempted as was actually used for the purposes named in the Constitution; and that there could be no exemption of lands held for profit merely, although such profit was devoted to educational, religious or charitable purposes. *Northwestern University v. People* (Ill.), 187.
3. *Exemption from—school of religious sects.]* A statutory exemption from taxation of school-houses and seminaries of learning extends to such as are founded by a particular religious sect for instructions according to its doctrines. *Wards v. Manchester* (N. H.), 504.
4. *Set-off by town.]* A town summoned as trustee or garnishee of an individual cannot set off taxes assessed by it on him against the debt due from it to him. *Hibbard v. Clark* (N. H.), 432.
5. *When tax cannot be recovered back—unconstitutional law.* A tax was assessed on land under a statute afterward decided to be unconstitutional.

Prior to such decision the owner paid the tax, under protest, to prevent a threatened sale. *Held*, that the payment was voluntary and that the money could not be recovered back. *Detroit v. Martin* (Mich.), 512, and note, 519.

6. *Cloud on title.*] A sale of land for taxes laid under an unconstitutional law does not constitute a cloud upon the title; and, therefore, payment of such taxes to prevent a sale is voluntary, though made under protest, and cannot be recovered back. *Ib.*

Of national bank stock.] See NATIONAL BANK, 1.

Right of municipal corporation to tax its own bonds.] See MUNICIPAL CORPORATION, 14.

For the payment of irregular municipal bonds — restraint of.] See MUNICIPAL BONDS, 141.

Of surplus capital of national banks.] See NATIONAL BANKS, 416.

See ASSESSMENTS FOR LOCAL IMPROVEMENTS.

TENANT.

See LANDLORD AND TENANT.

TENDER.

To sheriff of amount of execution discharges lien.] Where an execution has been levied on goods, a tender, by the judgment debtor to the officer holding the execution, of the amount due discharges the lien of the execution, and a subsequent sale under it is unlawful, and renders the judgment creditor, having notice of the tender, liable in trover. *Tiffany v. St. John* (N. Y.), 612.

TORT.

When may be waived and assumpsit brought.] See ACTION, 229, and note, 242.

TRADE.

Combination void, against.] See CONTRACTS, 171.

TRADE-MARK.

Assignment of.] The mere sale of a trade-mark, apart from the article to which it is affixed, confers no right of ownership; but where a trade-mark is used to designate the place and person by whom certain goods are manufactured, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made. *Wittlaus v. Brown* (Md.), 44.

TRANSFER OF CAUSES.

See REMOVAL OF CAUSES.

TRESPASS.

Duty of railroad company toward one unlawfully on its track.] See NEGLIGENCE, 112.

To real estate — words imputing.] See SLANDER, 543.

TRIAL.

See VERDICT.

TRUST.

Power — "legal representative."] A deed of trust gave a power to the trustee "or his legal representative," to sell the property conveyed by the deed on default of payment of the debts for which it was conveyed as security. *Held*, that the power could not be exercised by the administrator of the trustee but only by his successor in the trust. *Warnock v. Lombas* (Ill.), 85.

TRUSTEES.

When liable as principal.] See NEGOTIABLE INSTRUMENTS, 175, 177.

ULTRA VIRES.

Power of bank to take collateral securities, etc.] See NATIONAL BANK, 85.

UNITED STATES.

May take property within State.] See EMINENT DOMAIN.

USURY.

1. *Plea of, personal.]* The plea of usury is a personal privilege, and if the debtor declines to avail himself of it, no stranger to the transaction can. *Pritchett v. Mitchell* (Kan.), 287, and note, 290.
2. *Second mortgages.]* A second mortgagee cannot plead usury in a prior mortgage either to defeat or postpone its lien. *Ib.*

See CONFLICT OF LAWS, 564.

VAGRANTS.

Commitment of, to industrial schools.] See CONSTITUTIONAL LAW, 702.

VENIRE.

See GRAND JURY.

VENDOR AND PURCHASER.

Deficiency in land sold — where action lies to recover for.] Where a contract for the sale of land is fully executed and the purchase-money paid, the vendee cannot recover for a deficiency in the quantity of land without proof of fraud or of mutual mistake. While the deficiency, if great, is evidence of fraud, it is not conclusive. *Kreiter v. Bomberger* (Penn.), 750.

VERDICT.

Upon an indictment charging different offenses.] A general verdict of "Guilty" upon an indictment containing two counts, one for stealing a horse, and the other for receiving a horse, knowing the same to have been stolen, is error, and entitles the prisoner to a *venire de novo*. *State v. Johnson* (N. C.), 666.

VOLUNTARY CONVEYANCE

See GIFT, 54.

VOLUNTARY PAYMENT.

What is.] *See* TAXATION, 513, and *note*.

WATER-COURSE

Diversion of, by railroad — damage for.] See RAILROAD, 311.

WAY.

See HIGHWAY.

WIDOW.

1. *Right of, to mansion-house.]* The right of a widow to remain in the mansion-house of her deceased husband, as provided by statute, is not restricted to a personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the possession of the premises, and may, therefore, either personally occupy them or she may rent them, as she may deem best promotive of her comfort. *Conger v. Atwood* (Ohio), 363.
2. *—].* If the administrator of her husband's estate assumes to control the mansion-house of the decedent, and, denying the widow's right to the possession thereof, rents it to another person, the widow is entitled to the rents received by him during the period she is entitled to remain in the premises. *Id.*
3. *Action against administrator for rents.]* If the administrator has collected the rents to which the widow is so entitled, and has appropriated them to the payment of debts due from his intestate, she may elect to charge him in either his personal or representative character, and he cannot defeat a recovery by her in an action against him in his representative capacity, on the ground that he is personally liable therefor. *Id.*
4. *Liability of administrator for rents unlawfully collected.]* An administrator who, without authority, collects rents of his intestate's real estate, and uses them as assets in paying the debts of the estate, is liable to the party entitled to such rents, and he may recover the amount thereof of the administrator in his representative character. *Id.*

Statutory allowance to.] See ADMINISTRATION, 149.

WILL.

1. *Of widow, revocation of, by subsequent marriage.]* A widow, having children, made her will, married again and died without issue by her second husband. *Held*, that her will was not revoked by implication of law on her second marriage, nor by a statute passed after her marriage, which enacted that marriage should revoke a prior will. *In re Tuller* (Ill.), 164.
2. *Witness to — executor may be.]* The executor named in a will is a competent attesting witness thereto, where he has no beneficial interest therein other than the commission on the estate allowed by law for his services. *Stewart v. Harriman* (N. H.), 408.

3. *Burden of proof on probate of.*] The party who affirms that a will was duly and lawfully executed has the burden of proof, and has, therefore, the right to open and close a trial of its validity. *Hardy v. Merrill* (N. H.), 441.
4. *Opinions of non-professional witnesses as to sanity of testator.*] Upon the issue of a testator's sanity, non-professional witnesses, although not subscribing witnesses to the will, may testify to their opinions in regard to the testator's sanity, founded upon their knowledge and observation of his appearance and conduct. *Ib.*
5. *Devise to wife — effect of divorce.*] J. B., being about to marry E. J., made his will as follows: "I give and bequeath to my intended wife, E. J., the sum of \$1,000, to be paid her within one year after my decease," and directed the residue of his property to be equally divided among his children. Soon after the marriage the wife abandoned her husband, who, for that reason, in due time procured a divorce. *Held*, that the will being positive and unconditional, E. J., after the death of the testator, without a revocation of the will, was entitled to the legacy according to the terms of the will. *Charlton v. Miller* (Ohio), 807.

WITNESS.

- Indorser of note — cannot impeach consideration.*] The indorser of a negotiable instrument is not a competent witness to impeach its consideration. *Dewey v. Warriner* (Ill.), 91, and note, 98.
- Non-professional witnesses admissible on question of sanity.*] See WILL, 441.
- To will, executor may be.*] See WILL, 408.

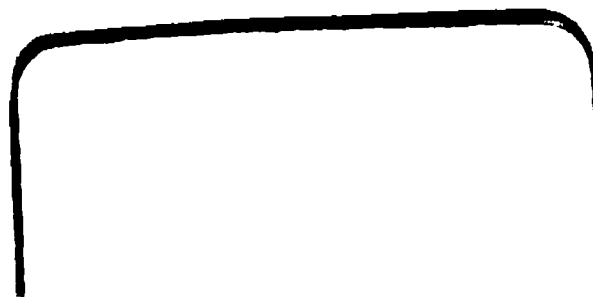
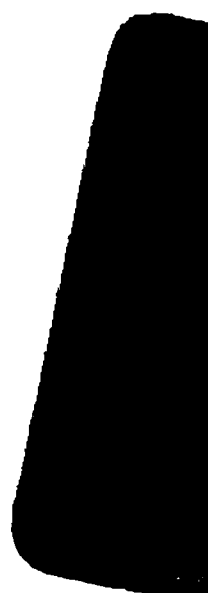
WORDS.

- "*After conviction.*"] See PARDON, 675.
- "*Any person.*"] See ANIMALS.
- "*Contained in.*"] See INSURANCE, 249.
- "*For benefit of wife and children.*"] See INSURANCE, 586.
- "*Legal representatives.*"] See TRUST, 85.
- "*License, tax and regulate.*"] See MUNICIPAL CORPORATION, 261.
- "*Receipt and acceptance.*"] See SALE, 619.





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